

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO.
AMD-04-029

WILLIE MITCHELL,
SHELTON HARRIS,
SHELLY WAYNE MARTIN,
SHAWN GARDNER,

Defendants

VOLUME XXIX OF XXXVII
Thursday, November 20, 2008
Baltimore, Maryland

Before: Honorable Andre M. Davis, Judge
And a Jury

Appearances:

On Behalf of the Government:
Robert Harding, Esquire
Michael Hanlon, Esquire
On Behalf of Defendant Mitchell:
Laura Kelsey Rhodes, Esquire
Michael E. Lawlor, Esquire
On Behalf of Defendant Harris:
Gerard P. Martin, Esquire
Paul Flannery, Esquire
On Behalf of Defendant Martin:
Thomas L. Crowe, Esquire
James G. Pyne, Esquire
On Behalf of Defendant Gardner:
Adam H. Kurland, Esquire
Barry Coburn, Esquire

Reported by:
Mary M. Zajac, RPR
Room 5515, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

1 (Proceedings at 9:43 a.m.)

2 THE COURT: We're still waiting for a juror, I believe.
3 I want to assure counsel that the additional filings and requests
4 for instructions have been reviewed, including the filing this
5 morning from Mr. Harris. And I am satisfied that I've covered
6 all the matters that have been supplemented by counsel. But if
7 we have a few minutes, if counsel wish to be heard briefly, I'm
8 happy to --

9 MR. MARTIN: My lawyer's going to speak.

10 THE COURT: Okay.

11 MR. FLANNERY: Good morning, Your Honor.

12 THE COURT: Good morning, Mr. Flannery.

13 MR. FLANNERY: Your Honor, very briefly. You saw a
14 filing this morning that was submitted last night. And that was
15 regarding the pattern of racketeering activity versus the
16 enterprise. And our position really would be that in this
17 particular case, where the government has gone to great lengths
18 to implant in the jury's mind that they need not find any formal
19 structure, that any informal group association of members is
20 sufficient to satisfy the enterprise, and then in Mr. Hanlon's
21 Power Point, his first bullet point as to proof as to why this is
22 an informal enterprise, literally was look at the pattern of
23 crimes that these individuals have committed.

24 And we think that that really creates confusion amongst
25 the jury, that they're going to find that, well, these guys, if

1 we think they got together and committed several acts, then that
2 to us, I guess that sounds to us like that's an enterprise.
3 That's an informal group of people. That's an association of
4 people that got together to commit some crimes.

5 That's just simply not the law. The law is that there
6 has to be some ascertainable structure absent that minimal
7 association that is, that the pattern of racketeering activity
8 necessitates. And so we really don't see why, at least maybe
9 just one sentence following that enterprise.

10 I suggested maybe following your specific instruction
11 regarding Shakedown or Sheistyville, that they can't simply look
12 at that minimal association, that they may find that any two or
13 more individuals required in order to commit any of the
14 racketeering acts, that that is sufficient to them to find the
15 enterprise as a matter of law. That's our position and, you
16 know, we want to state that for the record.

17 We really do think that it would not be unnecessarily
18 wordy or create more confusion or more legalese for the jury to
19 put something simple like that in the instruction. And it's
20 certainly a correct statement of the law.

21 THE COURT: All right. Thank you, Mr. Flannery. I am
22 confident that the jury's going to decide the case on the basis
23 of my instructions and not Mr. Hanlon's Power Point. Your point,
24 I understand your point. It's a fascinating issue. I don't
25 think, by the way, Mr. Hanlon misstated the law.

1 And I'll acknowledge, you know, this case probably goes
2 pretty close to the edge of what could be considered a
3 racketeering enterprise. But I have to say, I'm less skeptical
4 now than I was when I considered your motion, that is Mr.
5 Martin's motion, Mr. Harris's motion, joined in by all, I think,
6 to dismiss Count One, because when I looked at it sort of in the
7 abstract based on my limited knowledge of the evidence, it
8 looked, frankly, much weaker than it does three months later,
9 with the evidence in the case.

10 So we are -- I agree. We're near the edge. We are
11 almost in the policy of RICO. And I think Mr. Lawlor touched on
12 some of that yesterday. And frankly, I anticipate that, more
13 likely than not, Mr. Martin's going to spend most of his time
14 there. Mr. Pyne's going to spend most of his time there. I
15 don't know what Mr. Kurland's going to do.

16 MR. COBURN: Neither do I, Your Honor.

17 THE COURT: So in that sense, I agree with what's
18 implied in your argument, that this jury's going to have to make
19 a policy judgment. It's going to have to apply the law to the
20 facts. But to a not insignificant degree, the jury's going to
21 have to make a policy judgment.

22 Now, I permitted Mr. Kurland to flash his Vito Corleone
23 placard for seven seconds. But that's going to really frame it
24 for the jury, you know, on this continuum of the Sopranos and the
25 Corleones at one extreme and a typical, garden variety Baltimore

1 City group of drug dealers on the other extreme, where does this
2 group fall? And I think the government has marshalled sufficient
3 evidence, direct and circumstantial, and has educed sufficient
4 evidence of structure, continuity, organization, that a
5 reasonable fact finder could say, yeah, I think Mitchell was
6 essentially the leader, that Mitchell had college credits, that
7 Mitchell seemed to exercise some control over these guys, that
8 certainly, comparing Mitchell to Harris, Harris was doing
9 Mitchell's bidding. Certainly, if the Court credits the
10 government witnesses, Goo felt beholden to Martin.

11 So I think there's enough there. It's certainly not an
12 overwhelming case on Count One. But there's enough there. And I
13 think that the Court's instructions fairly, in a balanced way,
14 lay out the issues so that, to a certain extent, Count One's
15 going to be decided on the basis of argument.

16 So I see your point about Mr. Hanlon's Power Point.

17 MR. FLANNERY: I just want to say, I agree that he did
18 not misstate the law.

19 THE COURT: Yeah.

20 MR. FLANNERY: Because I acknowledge that the proof of
21 one coalesces with the other. I certainly acknowledge that. But
22 what I think the government has done is they've brought that fine
23 line to the forefront by, you know, defense counsel, rightly so,
24 has tried to frame the issue that it has to be more along the
25 lines of a formal organization, more along the lines of

1 structure, akin maybe to a hierarchy. And the government's
2 obviously taken an opposite approach, which is it can be an
3 informal organization, without those types of qualities.

4 And I think in Mr. Hanlon's presentation he brought
5 that argument to the forefront without here today in our
6 discussion providing the jury that extra instruction that, well,
7 although informal it may be, it can't simply be, essentially, it
8 can't simply be a conspiracy. It can't simply be that minimal
9 association to commit acts. It can't simply be that.

10 THE COURT: And that's what we're about to hear three
11 hours of.

12 MR. FLANNERY: Thank you, Your Honor.

13 THE COURT: By the way, Mr. Flannery -- correct me if
14 I'm wrong, Mr. Harding, Mr. Hanlon -- my belief is that
15 Sheistyville, the word "Sheistyville" appeared in the third
16 superseding but it's not in the fourth superseding.

17 MR. KURLAND: It is.

18 THE COURT: Can you give me the paragraph?

19 MR. KURLAND: No, I'm sorry. Shakedown.

20 THE COURT: I'm talking about Sheistyville. My
21 recollection is that Sheistyville was described in one of the
22 earlier indictments as the record label, but I didn't find it
23 anywhere in the fourth superseding.

24 MR. FLANNERY: I think that's correct.

25 THE COURT: So I don't mention it in my instructions

1 whatsoever. Obviously, counsel are free to mention it because
2 there was some mention of it, although not much, during the
3 trial. Mr. Harding?

4 MR. HARDING: That may well be. I can't remember
5 deliberately dropping the name. However, I can assure the Court
6 that it wasn't dropped because Tony Montana thought it was just
7 the name of the neighborhood.

8 THE COURT: Okay. I have no doubt about that.

9 I seem to recall pretty distinctly in one of the
10 earlier indictments it was described as a record label, but that
11 it's not in the fourth superseding.

12 So I do say, and by the way, somebody couldn't find,
13 maybe it was you, Mr. Flannery, who couldn't find the statement.
14 But I take it now you found it?

15 MR. FLANNERY: Yes.

16 THE COURT: All right. Mr. Crowe, good morning.

17 MR. CROWE: Good morning, Your Honor. We submitted a
18 very short supplemental instruction --

19 THE COURT: Which I have reviewed, yes.

20 MR. CROWE: -- last evening. And I'm sure the Court
21 understands the instruction. We do not find that, in the Court's
22 proposed instructions, and we're talking here about, really,
23 Pages 42 and 43, that there is a clear statement that any member
24 of the RICO conspiracy at a minimum had to agree that somebody
25 would commit at least two of the racketeering acts.

1 THE COURT: There certainly isn't that explicit
2 statement although, Mr. Crowe, as I'm sure you know, it's
3 actually in the indictment.

4 MR. CROWE: Well --

5 THE COURT: All right? But the way I handled that was
6 the way Sand has suggested it should be handled and the way in
7 which the government has requested me to handle it. And that is
8 that the defendant must agree to participate in the affairs of
9 the enterprise through a pattern of racketeering activity. And I
10 further instruct that the government's got to prove that the,
11 that the conspiracy committed or intended to commit at least two.
12 And I actually go on and say that they have to agree, they have
13 to be unanimous on which two.

14 So I agree that there's no straightforward statement,
15 You must find that to convict the defendant he agreed to the
16 commission of two racketeering acts. But I don't, I think that's
17 a literally correct statement of the law. But what it leaves
18 out, I think, renders it misleading in light of the instructions.

19 MR. CROWE: I think what it leaves out is covered by
20 the Court's other instructions. And perhaps the Court will be
21 more persuaded by what Judge Motz said on this issue than what I
22 say.

23 Just reading from the, what's called, I think the Honda
24 II litigation, the Multi-District Litigation decision in 1997,
25 published at 958 F. Supp. 1045.

1 THE COURT: Excuse me one moment. Go ahead, Mr. Crowe.

2 MR. CROWE: That was a case that I actually came into
3 somewhat later. I can actually say that was a bit more
4 complicated than this case.

5 And what Judge Motz said, and this is a direct quote.
6 Quote: "The ultimate issue in any Section 1962(d) case is
7 whether a defendant's knowledge of the nature, scope and
8 operations of the illegal scheme are such that it can be inferred
9 'that he agreed that another violates Section 1962(c) by
10 committing two acts of racketeering activity.'"

11 And then he cites the Pryba case in the Fourth Circuit
12 and then a Sixth Circuit case, which Pryba cites. And I think
13 that is, that is the ultimate issue. It is not set out
14 explicitly in the Court's instruction. You know, whether a
15 lawyer could tease that element out of the instructions the Court
16 has given, I think even that is debatable. But as bright as this
17 jury is, I think we need the instruction.

18 THE COURT: Okay. Thank you, Mr. Crowe.

19 MR. KURLAND: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. KURLAND: Judge, very briefly. We just want the
22 record to make it clear that we're joining in all of the defense
23 requests for the instructions that are denied.

24 And the one last point I would make, Your Honor, is
25 that with respect to the point Mr. Flannery was talking about, I

1 mean, the law is clear that the pattern of racketeering activity,
2 even though the evidence can overlap, is not the same as the
3 separate independent structural requirement. There needs to be
4 some organizational structure. We just want to preserve that as
5 well. It's our position as well that that isn't clearly set
6 forth in the instructions.

7 THE COURT: Thank you, Mr. Kurland.

8 MR. KURLAND: Thank you.

9 THE COURT: Good to have you with us, Mr. Coburn.

10 MR. COBURN: Thank you so much, Your Honor.

11 THE COURT: All right. Okay. We'll have the jury.

12 Could you remove the items from the DOAR, please, Ms.
13 Rhodes?

14 MS. RHODES: Actually, I have it set up so that I can
15 remove this blank page.

16 THE COURT: Oh, it's for Mr. Martin?

17 MS. RHODES: Yeah.

18 THE COURT: Okay. I'm sorry. I thought it was left
19 over from yesterday.

20 MR. MARTIN: God help, Your Honor, I couldn't possibly
21 operate it.

22 MS. RHODES: Many people standing by to help him
23 electronically.

24 (Jury enters the courtroom.)

25 THE COURT: Good morning, ladies and gentlemen. We're

1 ready to proceed. Mr. Martin, whenever you're ready.

2 MR. MARTIN: Thank you, Your Honor. May it please the
3 Court, ladies and gentlemen of the jury, good morning.

4 THE JURORS: Good morning.

5 MR. MARTIN: I hope I don't take too much of your time.
6 Everybody always says that to you and then they always do. I
7 guess it's good to apologize in the beginning and get that out of
8 the way. I'm going to do what I can to cover what I think I need
9 to cover and I'm going to do it as fast as I can.

10 If you think I'm going too fast, the first person to
11 tell me will be the court reporter. So I'm not too worried about
12 that. I have a tendency to speak pretty fast.

13 I want to thank you again for what you've done. We've
14 taken so much out of your lives. How long we've been here? Two
15 months? Just amazing to me that you can come in here every
16 morning, you can smile, you can concentrate on what's going on.
17 You know, I'd admit that for me it sort of gets away from me
18 every once in a while.

19 I was thinking the other day at a time when you were in
20 the jury room, we were waiting for you to come in, I was looking
21 around this courtroom, I was looking at all these judges here.
22 How many are there? Twenty? I have tried a case in front of
23 every one of them. I've been around, I guess, too long.

24 I had the privilege at one time of having the same job
25 that Mr. Harding has and Mr. Hanlon has. And so I have to tell

1 you that it just amazes me what I've seen happen over the last 30
2 years. But in one respect I'm astounded that in a case like this
3 the government would come in here and they would say to you on
4 the basis of the evidence that they have, that this is one
5 conspiracy that lasted for twelve years, that this is one
6 enterprise that lasted for twelve years. And that's what I want
7 to talk to you about today.

8 Now, Mr. Hanlon, Mr. Harding, they've done a fantastic
9 job. They've interviewed and put together, I don't know how many
10 witnesses they must have interviewed to select 75 to bring before
11 you. They've spent months, years of their lives putting this
12 case together. They put together this marvelous stage
13 presentation for you. The problem is that the conclusions they
14 draw don't make common sense. They don't follow common sense.
15 They don't follow logic.

16 They presented a lot of graphic, detailed evidence to
17 you, some pretty horrible evidence. Stuff about, that I'm sure
18 neither, none of you ever wanted to see. I certainly didn't want
19 to see. And I hope that when you think about that evidence, that
20 it doesn't cloud your judgment. It doesn't cause you to look the
21 other way from doing your duty, which is to individualize each
22 defendant, to treat Shelton Harris separately from every other
23 defendant, and to render a verdict based on the evidence and
24 based on the law as Judge Davis tells you what the law is, and
25 not to let your judgment be clouded by some of the horrible

1 things that we've seen in this courtroom here, to consider each
2 of them separately. So let me spend a little bit of time talking
3 to you about some of the basics in this case.

4 In a way, it's almost surreal. I find myself listening
5 to all the evidence, sitting here, trying to shuffle through
6 everything that took place. And I say to myself, you know,
7 there's something missing and I'm not sure I can put my finger on
8 it. In thinking about this case, what's missing is that while
9 the government stands here and tells you that there was this one
10 group, and that there was this one enterprise, what's missing is
11 the connection. It's not really connected. It's a bunch of
12 different things happening at different times with different
13 people, some of whom are the same. But there's not this
14 overarching connection.

15 And it starts, I guess, with, you remember a couple
16 weeks ago Judge Davis gave you an instruction at the end of the
17 day on a Thursday about the fact that sometimes a crime in the
18 state court, a state crime can be prosecuted in federal courts.
19 What's called the dual sovereignty instruction. And he told you
20 that when that happens, the federal charges always require
21 something extra, some different element from the state charge.

22 As an example, a murder ordinarily takes place in
23 Baltimore City, you wouldn't be trying it in this courthouse.
24 You would be trying it up Calvert Street in the Baltimore City
25 Circuit Court. But if that murder is committed in furtherance of

1 some federal crime, as here the government charges this Racketeer
2 Influenced Corrupt Organization, RICO, you've heard it referred
3 to, the enterprise. That's a crime, to run a RICO enterprise and
4 to commit acts in furtherance of the RICO enterprise is a crime.
5 And if one of those acts is murder, then it could be prosecuted
6 here in the federal court. But you have to have an enterprise.

7 Same thing with a drug conspiracy. Being involved in a
8 drug conspiracy and dealing drugs is a federal crime as well as a
9 state crime, so that can be prosecuted in federal court. And if
10 a murder is committed in furtherance of the drug conspiracy, then
11 that particular crime can be tried here in federal court.

12 And that's what I want to talk to you about today.
13 These charges are all based upon that principle, that there is
14 this normally state crime that requires proof beyond a reasonable
15 doubt of a RICO enterprise and/or a federal drug conspiracy, the
16 drug conspiracy charged here. Not some other conspiracy. Not
17 some conspiracy that might have existed between Willie Mitchell
18 and some women in Pennsylvania and some other people in
19 Pennsylvania, but the conspiracy that was charged in this
20 indictment here, 12 years, from 1994 to 2006, the enterprise that
21 was charged here, 12 years, from 1994 to 2006.

22 That requirement is that the government prove that that
23 enterprise and that conspiracy existed and they must prove that
24 to you beyond a reasonable doubt. That's the jurisdictional
25 extra that Judge Davis has told you about in his instruction and

1 will tell you about it again.

2 And I guess to put it in more simple terms, we've all
3 heard the saying, everybody's heard it, Don't make a federal case
4 out of it. Well, that's what the government's trying to do here.
5 They're trying to make a federal case out of these state crimes.
6 And therefore, it's absolutely critical that you focus yourselves
7 on the central issue in this case. Has the government proven
8 beyond a reasonable doubt that this RICO enterprise and this
9 conspiracy existed?

10 The government says all these defendants are bound in
11 some manner or form. How are they bound? Well, they say that
12 it's -- let me see. Mr. Hanlon said yesterday the core group is
13 Willie Mitchell, Shawn Gardner, Shelly Martin, Darryl Wyche, Will
14 Montgomery, Darryl Bacon, Aaron Holly, and later Shelton Harris,
15 and later Shakedown Entertainment. They say they're all joined
16 together in this conspiracy that lasted for a period of 12 years.
17 And that's what's charged here. Now, you have to find beyond a
18 reasonable doubt that that's true.

19 And if you believe that the evidence, instead of
20 showing this one big conspiracy and this huge enterprise that
21 lasted all these years, if you believe instead it shows smaller
22 conspiracies, smaller conspiracies within that, then the
23 government hasn't proven its case and the Court will instruct you
24 on that.

25 The Court will tell you that you must find the

1 government has established the specific conspiracy charged here
2 beyond a reasonable doubt. And the Court will further instruct
3 you that when there are separate, unlawful agreements to achieve
4 distinct purposes, then multiple conspiracies exist, not the
5 single one charged here. If that's the case, then your duty on
6 Counts 1 through 16 will be to acquit these defendants.

7 Now, the government will say, Well, you know, a
8 conspiracy can continue even if people come and go. It doesn't
9 have to be the same players all the time. And that's a correct
10 statement of the law. That's true, that a change in the people
11 who are in a conspiracy doesn't always mean that it's multiple
12 conspiracies. But it can be evidence of multiple conspiracies.

13 Don't fall into the trap they want you to fall in, that
14 just because this guy knows this guy and he's involved in this
15 drug deal and then they get involved in drug deal ten years
16 later, that that's all the same conspiracy. You need proof
17 beyond a reasonable doubt that some conspirators, and the Court
18 will tell you this, continued to act for the entire duration of
19 the conspiracy for the specific purpose charged.

20 And it's your prerogative and your right to consider
21 that when someone leaves a conspiracy, when it has a change in
22 personnel, that that's evidence that the later activity is a
23 separate and distinct conspiracy.

24 So the government says, all right. We got Mr.
25 Mitchell, we have Mr. Gardner, we have Mr. Martin. Three boyhood

1 friends formed a conspiracy. And they remain friends all these
2 years. They began young to do what kids everywhere do -- they
3 followed the example of their elders.

4 I remember when I was growing up what we did was, it
5 sounds quaint now, but it was a long time ago. As I told you,
6 I've been doing this in this courthouse for more than 30 years.
7 But when I was young, we followed the example of our elders. We
8 played sports. We graduated from playing sports to sneaking a
9 cigarette here and there. And from that we went to playing
10 sports, sneaking a cigarette, and drinking some beers when we
11 could get away with it.

12 Things have changed, as we all know. It isn't the same
13 any more. We all know that from our life experiences. The
14 examples are still set by the elders, but it has little to do
15 with the things that I grew up with. Instead, there appears to
16 be an endless cycle of poverty and despair. Schools are bad.
17 There's little or no parental guidance. And the occupation that
18 seems to offer the best chance to earn a living is selling drugs.

19 That doesn't mean that poverty, homelessness, poor
20 schools are an excuse for someone who sells drugs or gets engaged
21 in other activities, but they are facts of life.

22 But the government tries to use that friendship that
23 these three people had to tell you that it was a long-standing
24 conspiracy. These guys begin to do whatever they did when they
25 were 14, 13, sell drugs. You recall yesterday Mr. Harding, Mr.

1 Hanlon discussed with you the fact that, and it also came out in
2 the evidence that these people were in the Hickey School for a
3 robbery of some kind, armed robbery maybe, when they were 14?
4 That's evidence of the RICO conspiracy, because when three kids
5 that grew up in the ghetto end up in the Hickey School because
6 they're charged in an armed robbery, that that's a RICO
7 conspiracy?

8 And the drug dealing, well, we don't really know why or
9 how it started. We don't really have any evidence that they
10 began doing that together. There's no evidence in this court
11 that they began doing that together. There is evidence that
12 later on some of them did it together.

13 And why they chose 1994 as the beginning, I don't know.
14 Maybe it's just a convenient date when somebody got out of high
15 school. But I think there's ample proof of multiple conspiracies
16 here.

17 There's what I call the New York conspiracy -- Mr.
18 Gardner, Mr. Martin, Darryl Bacon. Mr. Mitchell maybe. And Will
19 Montgomery.

20 The government's case begins with the evidence, you
21 will recall, we spent weeks on evidence from the 1990's. The
22 stop on I-95, the arrests of Mr. Gardner and Mr. Martin in
23 October of 1996. A series of other arrests in the '90s. I think
24 Mr. Gardner and Mr. Martin were arrested in '96, '97, and again
25 in '98. And in '99, Mr. Gardner and Mr. Martin were stopped and

1 Mr. Martin went to jail for two years.

2 Mr. Bacon testified, you will recall. That was way
3 back in the beginning of the trial. It's so far back I can't
4 even remember what he looks like any more. Of course, with me
5 that's not surprising. You all probably have better memories
6 than I do.

7 But he says that he went to New York to buy drugs with
8 Mr. Gardner and Mr. Martin in the '90s. He said he made one trip
9 with Mr. Mitchell. But he said, my recollection is, and your
10 recollection's what controls, that there were no drugs purchased.
11 And I think they went to see Mr. Mitchell when he was in college
12 up there. That would have been between '96 and '98.

13 Now, the government throws a Shelton Harris arrest in
14 here when he was 15 years old for selling drugs on Woodland
15 Avenue and somehow claims that that shows what? That shows that
16 he knew about dealing drugs? Well, that's not a big surprise if
17 you grew up on Woodland Avenue. It wouldn't surprise you given
18 what you've heard here in this case, that somebody grows up on
19 Woodland Avenue and knows about the drug trade and actually
20 stands out on the corner and sell drugs.

21 The government says, somehow, does that make them part
22 of this earlier conspiracy? I don't think they claim that. I
23 think they claim it just shows knowledge that Mr. Harris knew
24 about the drug trade.

25 But Mr. Bacon went further. He said he got help one

1 time from Mr. Gardner and Mr. Martin in a turf war with somebody.
2 I don't remember the details of it, but he did say that. He also
3 said they each did their thing in different parts of town -- some
4 in Catonsville, some in South Baltimore, some in Southwest
5 Baltimore, some in Randallstown, some in Park Heights.

6 They cooked their own drugs, not together. They cooked
7 their own drugs.

8 And he said he was involved in a store, i guess a drug
9 store in Southwest Baltimore that he owned or he operated with
10 Shawn Gardner. Said he traded guns with Mr. Gardner.

11 Now, at this time, the government candidly admits
12 there's no Shelton Harris in any of this. Mr. Harris doesn't
13 come on the scene until he meets Mr. Mitchell in the Hickey
14 School. And he gets out of the Hickey School in December of
15 2000. So he doesn't come on the scene until January, 2001.

16 Mr. Bacon said that at some point in 2000, he went to
17 Pennsylvania with Shawn Gardner to sell drugs. Now, then enter
18 William Montgomery. And I'm not going to go through the details
19 of William Montgomery with you. The hit man. I will talk a
20 little bit about him later on. But Mr. Lawlor yesterday, I
21 think, told you all you need to hear about Mr. Montgomery.

22 What did Montgomery say? He said he dealt with Mr.
23 Gardner primarily; that he knew Mr. Martin and he dealt with him
24 somewhat. And that he knew Mr. Mitchell. But my recollection is
25 that he didn't know him very well. One of the reasons I say that

1 is he never knew what Mr. Mitchell's last name was.

2 He said he made one trip to New York that included
3 Gardner, Martin and Mr. Mitchell. And that was before 2000. I
4 assume that the trips to New York were to buy drugs.

5 He said that he went to New York a lot with Mr. Gardner
6 and Mr. Martin and Darryl Bacon from '97 to 2000, along with Mr.
7 Aaron Holly, who I think his nickname was E. But it's
8 interesting because there's no common supplier involved with
9 these people. Poppi supplied Mr. Gardner and Martin. And Darryl
10 Wyche supposedly, according to Mr. Bacon, supplied Mr. Mitchell,
11 who then passed some of those drugs on to Mr. Bacon.

12 I think that Mr. Bacon said that one time before 2000
13 Mr. Mitchell got him some drugs from Darryl Wyche, and that
14 during the year 2000 Mr. Mitchell told him that he was getting
15 drugs from Darryl Wyche.

16 And even Mr. Montgomery, who talks about this
17 conspiracy that's going on in the '90s, says that there was no
18 sharing of the profits. They never shared the profits. That
19 doesn't sound like much of a conspiracy to me. You know, if I'm
20 together with a bunch of guys I want to know if I'm getting my
21 fair share. It's sort of like the partnership that he talked
22 about, that Mr. Lawlor talked about yesterday.

23 Now, then the government brings on Mr. Ernest Reynolds,
24 who I think has taken the name Kaazim Reynolds. He came on
25 mostly to describe some conversations he had with Mr. Gardner in

1 jail in 2004, one of which was to the effect that Will Montgomery
2 had actually performed an act in the Spence murder but blamed it
3 on him. And the other was this notion that Mr. Gardner had
4 participated in the Spence murders because he needed to earn some
5 money to get a lawyer for Shelly Wayne Martin. And I'm sure Mr.
6 Martin's lawyers will talk about that. I'll mentioned it briefly
7 later. But I don't think there's any real evidence that you can
8 rely on that supports that notion.

9 In fact, Mr. Martin's mother came here and testified
10 that he had lawyer already and she had paid him. Harold Glaser.
11 She paid him \$10,000.

12 But most important about Mr. Kaazim Reynolds is that he
13 related evidence of yet a different conspiracy between 1993 and
14 1995. A real conspiracy. A real enterprise. One with a leader,
15 a man named Card, who's real name I can't remember. And other,
16 Fryson I think his name is, and other bosses. He and a person he
17 called NA, whose last name is Moultry.

18 And they had what? They had stash houses. They had
19 cutting houses. They had runners. They had people on the
20 street. They had people keeping their drugs that were being cut
21 separate from the drugs that were prepared to go on the street.
22 And all the profits were funneled up the line to him and NA and
23 then ultimately to Card, who was the leader and the source for
24 all the heroin.

25 And this is where Mr. Martin and Mr. Gardner got their

1 start. Mr. Reynolds said that it was Mr. Martin who he taught
2 how to cut drugs. Mr. Martin must have been, what? 13 or 14
3 years old at the time. I'm not sure. But I'm sure someone in
4 this courtroom will remember that.

5 And he said that Mr. Gardner came on line with NA, Mr.
6 Moultry. And he taught him how to cut drugs. He said they
7 really didn't do it together. But they trained them.

8 And Reynolds never knew Mr. Mitchell, never knew Mr.
9 Harris. If you ever needed evidence of what a real organization
10 was like, he described it.

11 Contrast that with what the government has shown you
12 here about this so-called conspiracy. What the government says
13 to you, no, no, no, Will Montgomery takes care of all that. Will
14 Montgomery said they were all family. That somehow what he said
15 demonstrates a single conspiracy and a single enterprise? The
16 government says it began in the '90s and morphed into the place
17 where the players became wholesalers. I guess they weren't
18 thinking very much about Mr. Hayes's testimony later on where he
19 said Hayes said, I sold on one side of the street, TM and Shelton
20 sold on the other side of the street on Woodland Avenue. That
21 doesn't sound like much of a wholesale operation going.

22 And he said they branched out. The government says
23 they branched out into committing murders and home invasions.
24 Like this is all one thing, one conspiracy, one enterprise.

25 Let's talk about that family that Montgomery said they

1 were, because that's the basis of this enterprise. They were
2 family. And you must have heard Mr. Hanlon use that word 50
3 times yesterday in his closing.

4 Family? Mr. Montgomery didn't even know Shelton
5 Harris. Family? He hardly knew Bo. He did not remember his
6 last name. Family? Darryl Bacon didn't know Shelton Harris. No
7 evidence of that.

8 Family? They were close knit. All Mr. Montgomery
9 really talked about was his relationship with Shawn Gardner.
10 That was the one he was closest to.

11 The notion that Mr. Montgomery, a stone cold killer,
12 could be relied upon by the government as the glue that you
13 should use to find out, to find that this one conspiracy and one
14 enterprise existed, is just ludicrous. And that's just number
15 one. That's just one conspiracy. There's lots of others
16 involved here.

17 There's a second conspiracy that I see in all of this.
18 And you're, obviously, your recollection is what controls. One
19 with no connection to anyone in this case other than Mr.
20 Mitchell. The Pennsylvania conspiracy in Altoona. Remember the
21 Duganne women came in here and said that they bought drugs there,
22 they sold his drugs.

23 Mr. Harris is not involved. He didn't even know Mr.
24 Mitchell at the time. Shawn Gardner, the evidence was, sold in
25 Pennsylvania. But the evidence was clear, it had nothing to do

1 with what Mr. Mitchell was doing. It may not have even been at
2 the same time. I don't remember the exact times.

3 Now, there's a connection to Baltimore because the
4 drugs came from Baltimore. That much of the evidence is clear.
5 But we don't know who the drugs came from in Baltimore.

6 Mr. Martin wasn't involved. He was in jail. Mr.
7 Gardner was in jail for part of that time. But the witnesses
8 said he sold in a different town in Pennsylvania, had no
9 connection with it. So there's a second discrete conspiracy
10 involved really only Mr. Mitchell here.

11 Now, the government tries to tell you that Mr. Wyche
12 was a supplier as opposed to Poppi involved in these, either one
13 of these first two conspiracies. I honestly can't recall how all
14 that fits together. But I suggest to you that that's
15 speculation, that Mr. Wyche was supplying the Pennsylvania
16 conspiracy or the New York conspiracy.

17 Now, the third conspiracy involving Darryl Bacon, Mr.
18 Mitchell and Wyche. I mentioned that earlier when I talked about
19 Mr. Bacon and the possibility of drugs coming from Mr. Wyche.
20 That could either be part of one of the first two or it's a
21 separate conspiracy.

22 You heard that some Wyche drugs were supplied through
23 Mitchell to Darryl Bacon. Mr. Bacon said I believe it happened
24 once before 2000. And he said that during the year 2000, he
25 learned that during the year 2000, Mr. Mitchell told him he was

1 getting drugs from Mr. Wyche.

2 Ladies and gentlemen, Shelton Harris isn't involved in
3 that. Apparently, Shawn Gardner's not involved in that. How
4 that connects with the rest of this is beyond me. This is
5 another stand-alone conspiracy.

6 Then there's the evidence of what happened in 2002,
7 February, March, April of 2002. I suppose you would look at
8 that, you could look at that as a conspiracy involving, if you
9 believe everything that the government's put before you, Mr.
10 Mitchell, Mr. Harris, perhaps Mr. Martin, and perhaps TM, you
11 know, Willie Montana, Mr. Mark Herbert. That's a fourth
12 conspiracy, ladies and gentlemen.

13 Mr. Harris doesn't come into that until the Hickey
14 School, as we know. Mr. Mitchell was his counselor at the Hickey
15 School, of all things. And then Mr. Harris and he begin an
16 interest in rap music. And when he gets out, Mr. Mitchell had
17 set up this company. And Mr. Harris wants to get into the rap
18 business and Mr. Mitchell's going to be the promoter. And that's
19 in 2001, ladies and gentlemen, when he came home from the Hickey
20 School.

21 Shakedown Entertainment is formed around or about that
22 time. And you'll notice that in one of our exhibits, we have a
23 contract that was found in Mr. Harris's home. Wasn't signed by
24 anybody but it was between Shakedown Entertainment and Mr.
25 Harris. And he was, Mr. Mitchell was supposedly promoting the

1 rap group. Mr. Harris was a writer and performer for that group.
2 And the evidence is, the evidence in this case is that all those
3 raps were written and recorded after Mr. Mitchell and his friend,
4 Mr. Martin, had gotten locked up for the Wyche murders in April
5 of 2002.

6 Remember the phrase, Bo and Weaze on lockdown now. If
7 they're not on lockdown, they're not writing that. So they're
8 all in jail. So the raps are all written after these crimes
9 supposedly are committed by these people.

10 Up to that point in time, there's not a shred of
11 evidence, until you see the raps, that Mr. Harris even knows Mr.
12 Martin. And there's not a shred of evidence in this case
13 anywhere that Mr. Harris knows Shawn Gardner, not a single piece
14 of evidence anywhere.

15 And the evidence with respect to any connection between
16 Mr. Martin and Mr. Harris prior to, well, there's no evidence
17 prior to Mr. Martin and Mr. Mitchell being locked up. And the
18 evidence then is that if you recall the search of Seamon Avenue,
19 what is the first sign, one of the signs they find is not free Bo
20 and Weaze, it's free Bo. Just free Bo. Not free Bo and Weaze.

21 And we know that Mr. Harris knew Mr. Mitchell at that
22 time and we know that Mr. Mitchell knew Mr. Martin when they grew
23 up, and we know that Mr. Mitchell and Mr. Martin were locked up
24 together at a time when Mr. Harris would visit them in the jail.

25 So I don't want to make too much of this, the artistic

1 aspect of these raps. I have to admit to you that most of the
2 stuff is beyond me. I have a stepson who thinks I'm from another
3 planet. You know, he listens to this music. And I guess I am
4 from another planet as far as he's concerned.

5 But everybody who testified about this, including Mr.
6 Cook, said, you know, there's an artistic aspect to this. And
7 some of the horrible things you hear. What did Mr. Herbert, TM,
8 say about it? That's what on the rap is 99% lies. Mr. Cook said
9 the overwhelming majority of self-confessions in the rap business
10 are just simply made up.

11 I don't know whether that's true or not. That's his
12 experience with all the years that he spent studying this stuff.
13 I have no idea. But you consider all the anecdotal evidence.
14 How do people write things? They write about things that they
15 hear on the street. And they want to promote themselves. And
16 what sells, according to Mr. Cook? Sex, violence, rock and roll
17 kind of stuff. You got to have that in there. You got to be
18 real. You've got to tell everybody that you're real.

19 If you ever watched the movie, if you watched the Tony
20 Montana movie, Scarface, you can see the seeds of all this stuff
21 and how it finds its way into the songs that these rappers write.

22 And it's important for you to consider all this when
23 you consider the government wants you to rely on the raps to
24 prove the enterprise. The raps prove, at best, something went on
25 in 2002, in that brief period, something not connected to

1 anything else that took place in this case. And you know
2 particularly that the raps were written after the events in
3 question.

4 Even if the raps are evidence that Mr. Harris and Mr.
5 Mitchell may have committed some of these crimes, even if they're
6 evidence of that, they're evidence of the crimes, as I said,
7 really only evidence of McCaffity/Brown. They don't even talk
8 about the Wyche murders and they don't say anything about the
9 Spence murder. So really only evidence of McCaffity/Brown. And
10 if that's the case, they still don't prove that this enterprise
11 existed. And you have to find, before you can find anything else
12 in this case, that there was an enterprise that consisted of
13 these people and that they were doing all these things that the
14 indictment sets out. You have to find that, ladies and
15 gentlemen.

16 So they all take place in the events that we spent,
17 what, and we've been here eight weeks, six of those weeks were
18 probably spent on McCaffity/Brown, Wyche brothers and Tonya Jones
19 Spence. And the government says these are the four acts that
20 bind this case together. Mr. Hanlon said to you yesterday, these
21 are the acts that are the heart and soul of the government's
22 case. It sure is. Those are the acts, at least as far as
23 they're concerned, the heart and soul of their case. And we say
24 that rather than bind these four defendants, it proves just the
25 opposite. And we can talk about the specifics later on.

1 But in order for you to understand the concept of
2 enterprise, the all for one/one for all, you have to think about
3 what the indictment says, first, Paragraph Four. I'm going to
4 paraphrase this because it doesn't say it in the kind of wording
5 I would use.

6 Basically, it says the purposes of the enterprise were
7 to get rich by selling drugs, robbing and killing people in the
8 drug trade for their drugs and money, to stay rich by
9 intimidating the competition and killing them, to promote and
10 enhance the members' activities, whatever that means, to maintain
11 and promote the rap business, and to prevent and obstruct
12 prosecution of members through witness intimidation and
13 disruption of court proceedings. That's all the stuff that you
14 hear at the later end after everybody's locked up.

15 The evidence establishes at best that Mr. Harris and
16 Mr. Mitchell may have participated in a, at best, a conspiracy to
17 kill Mr. McCaffity and Ms. Brown. But the notion that it was
18 part of a RICO enterprise is just plain crazy.

19 First of all, the evidence is undisputed. It was one
20 of two things. It was either a preemptive strike because Mr.
21 Mitchell thought they were going to kill him, or it was
22 retaliation because Mr. Mitchell, having gotten beat up in the
23 fight at Hammerjacks. This is a purely selfish reason, personal
24 to Mr. Mitchell alone, has nothing to do with the goal, so-called
25 stated goals of an enterprise.

1 As Mr. Hayes said, it's retaliation, or, as the
2 government claims, it was a preemptive strike.

3 The government's going to argue this is consistent with
4 the goals. Why? Because it keeps Mr. Mitchell on the street to
5 be able to run the enterprise. But at the same time they say,
6 they tell you in their closing, well, it wasn't one person. One
7 person would step up for this act and they'd have another leader
8 for this act and another leader for this act.

9 I suggest to you, ladies and gentlemen, what is it? Is
10 Mr. Mitchell the leader or is he the leader in act one and
11 someone else is the leader in act two? That's not much of an
12 organization. That's not much of an enterprise.

13 With respect to the McCafferty/Brown murders, there's no
14 evidence that Shawn Gardner knows about it at all. There's no
15 evidence he's ever consulted. There's no evidence that Shelly
16 Wayne Martin is consulted or that he knows anything about it.
17 This is purely personal and involves only, at best, Mr. Harris
18 and Mr. Mitchell, and does nothing to further the enterprise.

19 The government says keeping Bo alive furthers the
20 enterprise. I mean, that's like saying Tony Soprano is walking
21 down the street and some drunk gets up off the street and tries
22 to kill him and somebody kills him. Does this further the
23 enterprise, by keeping Tony Soprano alive? Is that part of a
24 conspiracy? No, it's just a random act, which is what we're
25 talking about here.

1 The Wyche brothers. Act two. The government has
2 proved it best. If you believe everything they say and
3 everything they put before you, that Mr. Mitchell, Mr. Harris and
4 Mr. Martin are in the car after the murders, Gardner's not there
5 and there's no evidence of Gardner being involved in any of this.
6 But now the government comes in and says, well, you know, when
7 Gardner was in jail or when Bacon was in jail, Gardner and Martin
8 visited him and Gardner and Martin said to Mr. Bacon, you know,
9 the rumor on the street is that Mr. Lassiter is talking to the
10 police about us.

11 And so that's supposed to somehow connect Shawn Gardner
12 to this, because he heard and tells his friend that someone on
13 the street is saying that Mr. Lassiter's involving them in this
14 crime? That's not evidence that Mr. Gardner has anything to do
15 with the Wyche brothers murder. That's just simply evidence that
16 somebody on the street is saying something.

17 And the government says, well, no, the Wyche brothers
18 is part of this enterprise. Why? Because it's a murder of a
19 drug dealer. Taking the drugs from the dealer, taking the
20 dealer's money. That doesn't make much sense here when you
21 consider that most of the drugs and most of the money were left
22 behind.

23 If that's the motive, then these guys aren't very
24 smart. Nobody ever said criminals had to be smart. But the
25 government wants you to believe these guys were sophisticated in

1 the drug business and they knew what was going on. So they know
2 where a drug dealer keeps a stash. And the murder takes place in
3 an area, as Mr. Hanlon pointed out yesterday, where nobody's
4 going to be around. It's an isolated, industrial area. After
5 dark everybody goes home. So you would have had plenty of time
6 to go through the car to find the drug stash, which apparently
7 was in plain view if you opened the trunk. Nobody did that.
8 They left money and drugs there.

9 So the motive, the so-called, with the goals of the
10 enterprise, to rob drug dealers and take their money, just
11 doesn't seem to me to make much sense. Doesn't seem to be what
12 happened there.

13 And then the government's evidence about Wyche is also
14 a little strange as far as I'm concerned. You have these dueling
15 transcripts that are out there. There's this phone call, the
16 Magginson phone call, that you're probably sick and tired of
17 hearing about by now. And the government has a transcript. And
18 they say that on that transcript the words are, someone says
19 "hello" and then the next words you can understand are, the
20 government says it's, I'm calling your house, Shorty.

21 And then we prepared a transcript. And Mr. Hanlon said
22 yesterday, Well, all our agents listened to this and this is what
23 they say it says. Well, I listened to it, Mr. Flannery listened
24 to it, and that's what we say it says. It doesn't matter what I
25 tell you it says and it doesn't matter what the government tells

1 you that it says. What matters is what you think it says. And I
2 want you to go in the jury room and I want you to listen very
3 carefully to that.

4 I submit to you that what it says is not, I'm calling
5 your house, Shorty. It says, I am coming to your house, Shorty.

6 And remember, Detective Niedermeier, I asked him about
7 this earlier transcript prepared by the State's Attorney's Office
8 and he disclaimed it. He said, I don't know, I didn't prepare
9 it, I didn't have anything to do with it. But there was an
10 earlier transcript.

11 And then there was another earlier transcript that was
12 testified about by Detective Benson, when he testified in the
13 grand jury, in which he said you clearly hear on that -- there's
14 this dispute, also, about whether it said bup, bup, bup, which is
15 what we say it says on the transcript. The guy's emulating,
16 whoever was in the car, emulating the sound of the guns going
17 off. Versus buc, buc, buc, which is the government's version,
18 the later version. In the grand jury, Detective Benson testified
19 from some version that said bup, bup, bup. Now they say it says
20 buc, buc, buc. Why? Because the government looked at all these
21 rap lyrics that they found in Mr. Harris's house and the word
22 "buc" is used constantly. So the government wants to make that
23 fit with their theory of the case.

24 So I submit to you that during the trial Mr. Harding
25 got nervous with his theory of the case. And when he did that,

1 he had Mr. Benson testify on direct examination that there was,
2 in these cell phone calls, there was a, you recall Exhibit 66,
3 W-66, which is on the screen here, I think. Can you see that?
4 Just going to see one side of it. W-66. And I think what
5 Detective Benson said was that this phone call here, this is the
6 Magginson cell phone call, that because of the times that that
7 phone call lasted, that this phone call here, which is the call
8 made during, you can hear it during the cell phone, when they
9 say, I'm calling your house, Shorty, this is the call made from
10 Willie Mitchell's cell phone to Mr. Harris's home, to his
11 landline.

12 What Detective Benson says is because, in order for
13 this call in the middle here, this call from Natasha Wyche's home
14 phone to Darryl Wyche's cell phone, when she was trying to track
15 him down, that in order for that call, in order for that call to
16 have been billed, this call here had to be finished by the time
17 that call got billed and that, therefore, given these times, the
18 call from Mitchell phone to Harris's phone could only have been
19 made after this call ended. And therefore, the implication being
20 that on this call he could not have been talking to anyone in
21 Harris's home and instead he's talking to someone in the call, in
22 the car.

23 I submit to you, ladies and gentlemen, that that's
24 what, on direct examination, Mr. Harding tried to get Detective
25 Benson to say. And that's what he said. Basically said the two

1 didn't intersect. You couldn't have heard, the Harris call was
2 not being recorded on that other call. The fact that he was
3 going to make a call was being recorded, but not the call.

4 So on cross examination, Mr. Pyne started asking
5 Detective Benson about these particular calls and about the fact
6 that the, the cell phone of Mr. Mitchell was recording the same
7 call that the Wyche phone was recording, but was recording it as
8 much as a minute and few seconds later. So if a call was made at
9 1:00 on, it showed on Mr. Mitchell's bill as 1:00, it might be
10 1:01, the same call, on Mr. Mitchell's phone.

11 I submit to you, ladies and gentlemen, that that
12 essentially amounts to comparing apples to oranges.

13 I put the three of them up there for you and I hope
14 that you can see them all. Can you see them? This would be the
15 result of the analysis that was testified to on Detective
16 Benson's direct examination. The first call at the top, that
17 Darryl Wyche call, that's the Magginson call. It went from
18 12:38:21 to 12:43:30, according to the Wyche record.

19 Then the Natasha Wyche landline call or her cell, we
20 don't know which, to Darryl Wyche's cell phone was the same cell
21 phone. As you can see, it's on the upper left. And on the right
22 side in the middle there. 12:43:30 it begins, in the last three
23 minutes. And therefore, according to Detective Benson, the
24 bottom call, the Willie Mitchell call to Shelton Harris's home,
25 which didn't begin, according to Mitchell's records, until

1 12:44:06, could not have been recorded on the Magginson call,
2 which is the one on the top line. That's comparing, ladies and
3 gentlemen, apples with oranges.

4 Upon cross examination, ladies and gentlemen, it came
5 out that there was this lag time between Mitchell's phone and
6 Wyche's phone. And as much as a minute, and I think a minute and
7 ten seconds, it could be. And what I suggest to you, ladies and
8 gentlemen, is all you need is 39 seconds. If you look at the
9 top, Darryl Wyche's call, the call from, to Magginson's cell
10 phone, 12:38:21 to 12:43:30.

11 If you adjust Mr. Mitchell's time only by 39 seconds,
12 if you adjust the time on his cell phone, then the cell phone
13 call to Shelton Harris was made at 12:43:27 and lasted until
14 12:43:46.

15 And then the Natasha Wyche call could come on at
16 12:43:30. It would be being called and would come on. And
17 therefore, the Natasha Wyche call to Darryl Wyche's phone does
18 not, does not in any way mean that the conversation that took
19 place on the cell phone with the call to Harris's house could not
20 have been recorded. And if you consider that, ladies and
21 gentlemen, and you think about what is said on the cell phone
22 call.

23 Would it make any sense to say to someone sitting next
24 to you, I'm calling your house, Shorty, at 1 or 2:00 in the
25 morning? I'm calling your house, Shorty? Who's he going to

1 call? Mr. Harris's mother, who goes to bed at 8:00 at night
2 because she gets up at four in the morning to go to work? Mr.
3 Harris's girlfriend, who didn't live there any more and hadn't
4 lived there for more than a year? That's not going happen. Mr.
5 Mitchell has no reason to call them.

6 You wouldn't turn to someone sitting next to you and
7 say, I'm calling your house. What does make sense is he calls,
8 the call is connected, and says to Mr. Harris, I'm coming to your
9 house, Shorty.

10 And then you have the evidence from Detective
11 Niedermeier about the sounds in the background. The click,
12 click, click, click, click, which he says are the steel struts in
13 the Jones Falls Expressway. The testimony from the government,
14 the government would have you believe that means you're going
15 over the steel struts when you're heading toward Druid Lake to
16 throw the guns and the stuff away from that you took from the
17 Wyche murders.

18 Well, if you look on, I think it's map two, it's the
19 big map that's sitting out over there that Mr. Harding had been
20 using, you also find that in the same direction as Druid Hill
21 Park from where they would have been up on the Jones Falls, is
22 Amity Street, Mr. Harris's address, where he was living. And the
23 evidence is pretty clear to me, I think certainly at least
24 there's a reasonable doubt with respect to the fact that Mr.
25 Harris was or was not in that car.

1 I don't think that you can find beyond a reasonable
2 doubt that Mr. Harris was in that car, given this information,
3 given the cell phone analysis, and given the fact, if you listen
4 to that tape, it says, I am coming to your house, Shorty. Not
5 I'm calling your house, Shorty.

6 It's almost like if you've been in a car, you can hear
7 the hello. Both the transcripts, everybody agrees that just
8 before that statement there's a hello, like somebody's saying
9 hello on a cell phone. Hello, I'm coming to your house, Shorty.
10 Or Hello, I'm calling your house, Shorty? Who would you be
11 talking to on the other end of the phone?

12 And he raises his voice. So a lot of times like if
13 you've made a call in your car and there's somebody else in the
14 car, when the call connects you raise your voice and you can hear
15 that. That's why you can hear more clearly that next sentence
16 than almost anything else on the tape.

17 So I submit to you that the common sense application of
18 this evidence is that the cell phone evidence proves that Mr.
19 Harris was not in the car that night. And he was not at the
20 scene and he is not responsible for the Wyche murders.

21 Then there's the third act, the Tonya Jones Spence. I
22 submit to you, ladies and gentlemen, this is really a fourth
23 conspiracy. The government wants you to buy that this is part of
24 the enterprise and part of the acts that these people were
25 committing. And I suggest to you that that claim is so absurd as

1 to be ridiculous. It shows the stretch that the government makes
2 here.

3 There's no evidence to connect Mr. Harris or Mr.
4 Mitchell to that crime. There's very little to suggest a
5 connection to any other defendant other than Mr. Gardner.

6 Montgomery says that Shelly Wayne Martin was involved
7 in planning of a different crime to kill Goose. But that got
8 changed by Montgomery without any input from any of these
9 defendants. And I'm not sure of the reason it was changed. I'm
10 sure Mr. Harding will fill you in. But I think he'll say Mr.
11 Montgomery said, Well, it got changed because Mr. Martin got
12 arrested and he wasn't around, and Montgomery was looking for
13 some place where he could make some money. And that Montgomery
14 says that Darius Spence approached him and said, this guy, this
15 guy was, this guy was having an affair, Mama was having an affair
16 with my wife and I want you to kill him or I want you to mess him
17 up. And Montgomery says, being the kind gentleman he is, Well, I
18 don't want to kill him, if I'm going to do something to him, I
19 might as well kill him because otherwise he will come after me.
20 And he sought out the contract to kill him.

21 Then he went and he found out Mama is a good guy. So
22 he went to Mama and said, you know, this guy wants to kill you, I
23 think it would be better if you let me kill him.

24 This is all Mr. Montgomery's idea. The other
25 defendants don't have anything to do with this except perhaps Mr.

1 Gardner. The crime was Mr. Montgomery's brain child. It's Mr.
2 Montgomery who got this great deal here. He's not going to serve
3 life without parole in federal prison. He's going to get out
4 some day unfortunately.

5 Now, the only defendant here who clearly could have
6 anything to do with this is Mr. Gardner. And I say the
7 government only put this case in here because of the truly
8 graphic nature of this crime. The horrible evidence. You saw
9 the woman jumping off the balcony, people shooting her, the two
10 guys shooting her, the children seeing all this. And the
11 government played, as is their right, played every single bit of
12 that out here in front of you.

13 But the crime was Mr. Montgomery's idea. Mr. Harris,
14 Mr. Mitchell, they had nothing to do with it. Mr. Martin really
15 had nothing to do with it. Bo and Weaze on lockdown now.

16 So what does the government do? They've got to connect
17 it. So they come up with this cockamamie story. Goo needed
18 money to pay for Wayne's lawyer. You recall that? This is a
19 story that Montgomery only cooked up after many proffer sessions
20 with the government. How many did he have? Six? Seven? I'm
21 not sure.

22 And then Mr. Kaazim Reynolds, after his proffer
23 session, comes up with the same story. Isn't that interesting?
24 They both said, Well, he needed a lawyer. Well, he didn't need a
25 lawyer, number one. He already had a lawyer and the lawyer had

1 already been paid for. So it wasn't necessary to do that. But
2 the government wants to connect this. They're trying desperately
3 to connect this.

4 And it's really not very smart, it's downright stupid,
5 because Martin already had a lawyer that's being paid. It does
6 nothing to tie Mr. Harris or Mr. Mitchell to this crime. And it
7 was clearly the work of Montgomery so he could pick up another
8 fee. It has nothing to do with the alleged goals of this
9 enterprise.

10 Mr. Harding will tell you, well, you know, there was an
11 enterprise. Mr. Montgomery said it was family. Montgomery, who
12 I said, I pointed out to you earlier, never met Mr. Harris,
13 didn't know Mr. Mitchell's last name, stone cold killer out on
14 the street look for new commissions, new work.

15 The assertion that the enterprise defined in the
16 indictment as the Randallstown/Park Heights organization and its
17 members were alleged to be Mr. Mitchell, Mr. Harris, Mr. Martin,
18 Mr. Gardner, plus the others that were unnamed at the time, but
19 now appear to be Mr. Bacon, Mr. Montgomery and Mr. Holly, and I
20 suppose any other street hustler who ever met these guys, you
21 know, TM, Dwight, Little Pill.

22 If you're not comfortable and believe beyond a
23 reasonable doubt that that specific organization even existed as
24 defined by the government in this indictment, then the verdict on
25 Counts 1 through 16 should be not guilty.

1 Judge Davis is going to tell you today, I hope it's
2 today, a group of people, an enterprise is a group of people who
3 have associated together for the common purpose of engaging in a
4 course of conduct over a period of time. Here, that period of
5 time is 12 years. That was an ongoing organization. An ongoing
6 organization. Formal or informal. Doesn't have to be formal.
7 Nobody ever said it had to be formal. You don't have to hang out
8 a flag on your porch and call yourself the Randallstown/Park
9 Heights organization.

10 And the name was something that the government applied
11 to this organization. It wasn't a name the organization chose
12 for themselves.

13 But it has to be ongoing, formal/informal, has to have
14 personnel who function as a continuing unit. In other words, it
15 must have continuity, unity, shared purpose, and an identifiable
16 structure. That's what the law requires. And if you can't find
17 that with this organization, then you can't convict these
18 defendants of these counts, these first 16 counts. If you can't
19 find that there was this enterprise in this organization, if you
20 can't find that it was one single drug conspiracy all those
21 years.

22 And whereas here the enterprise charged is a wholly
23 illegal criminal one, I suggest to you, ladies and gentlemen,
24 that to find that organization, that structure, you can't just
25 look at the criminal acts. You have to find something beyond the

1 criminal acts that the government is trying to prove here.

2 As I said three times and I'll probably say four more
3 times before I'm done, the government has to prove that the
4 conspiracy charged in this indictment and the enterprise charged
5 in this indictment had the existence, had a separate existence
6 beyond the minimal organization and association necessary to
7 commit these acts, and that that specific enterprise, you have to
8 believe beyond a reasonable doubt that that specific enterprise
9 existed.

10 I know this is a lot to digest. The law, I mean, as
11 long as I've been doing this, this law is very difficult to
12 understand. I think anybody who deals with it and is honest with
13 you would tell you that. But it doesn't have to be because you
14 can reduce this. You don't need the lofty words and the
15 legalese.

16 Think Sopranos. Everybody's familiar with The
17 Sopranos. They had a leader. They had a hierarchy. They had an
18 organization. They had assigned tasks. People had their jobs.
19 Some people were assigned to the labor unions. Some people were
20 assigned construction. Some people were assigned drugs. Some
21 people were assigned prostitution. They shared profits and risk.
22 There was continuity. Some members leave, usually not willingly,
23 but they left. Some go to prison and return and clearly reenter
24 that organization. In other words, continuity. Unity. Shared
25 purpose. Identifiable structure.

1 Or think closer to this case. Let's think the Rice
2 brothers. Perfect example. You heard Mr. Clash and Mr. Golder.
3 What did they do? They had leaders. They had assigned drug
4 buyers. They had assigned enforcers. They had runners. They
5 had stash houses. They had counting houses. They had a common
6 source and one person in charge of dealing with all the
7 suppliers. They had one person in charges of distribution. They
8 laundered money. Flashy cars. The Bentley. Lots of bling.
9 Money in the banks. Real estate. Mr. Golder and Mr. Clash,
10 maybe both, but at least one of them forfeited significant money
11 and significant real estate. And they met regularly and they
12 discussed future actions and options.

13 And the best example of that is, they had a meeting
14 after the Hammerjacks incident to decide what they were going to
15 do about Mr. Mitchell after the stabbing. But Mr. Harding, Mr.
16 Hanlon said to you, well, you know, we like the Rice
17 organization, too, because Mr. Golder and Mr. Clash said, We were
18 just a bunch of friends. Well, that may be true. They were just
19 a bunch of friends, too, just like Martin and Gardner and
20 Mitchell. But they were friends who had leaders, assigned drug
21 buyers, assigned enforcers, runners, all the things that an
22 enterprise and an organization have. And all that's missing
23 here.

24 Mr. Harding will say to you, Well, Mr. Golder, Mr.
25 Clash, they said that they had their own deals outside the

1 bubble. But you know what, ladies and gentlemen? They may have
2 had their own deals outside the bubble. But that's the point.
3 There was a bubble to be outside of. There's no bubble in this
4 case. There's no bubble in this case whatsoever.

5 What the Rice brothers did is an enterprise, not this.

6 And where's the continuity? The government wants you
7 to substitute the boyhood friendship for that. You have to show
8 something more than random comings and goings. You have to show
9 something more than just these guys knew each other from when
10 they were growing up.

11 The government says, Well, there was this core group.
12 Well, you know, as I told you before, Mr. Shelton Harris doesn't
13 know most of the people in this group, including Mr. Gardner. He
14 didn't know him. There's no evidence he knew him. Mr. Martin,
15 did he know him after he went in jail when this was all over?
16 Maybe. He wrote about him, there's no question about that.

17 Will Montgomery didn't know him. Darryl Bacon didn't
18 know him. Did Aaron Holly know him? We don't have any evidence
19 that Aaron Holly knew him.

20 Ladies and gentlemen, this core group idea is just a
21 fantasy. It's something the government needs to say to you in
22 order to roll over the top of you and hope that you will buy what
23 they're trying to sell to you.

24 Unity? What's the unity here? Mr. Harris comes in and
25 he knows one person, Mr. Mitchell. Doesn't know Montgomery,

1 doesn't know the others. I could keep saying that and I promise
2 you I'll try to stop saying that because I think you get the
3 idea.

4 Shared purpose. Well, the McCaffity/Brown murder was a
5 maverick act. It was something -- and so, too, was the Spence.
6 Had nothing to do with one another. The government says, well,
7 we can link them all they were all drug. Try robbing a drug
8 dealer and trying to take the drug dealer's money, but that's not
9 even what happened with the Wyche brothers.

10 So they all dealt drugs in different places at
11 different times with no coherent organization. I suggest to you
12 that that evidence does not show an enterprise, does not show a
13 single drug conspiracy.

14 And I think by presenting the evidence about the Rice
15 brothers and about Mr. Reynolds with Card and all those other
16 people, the government actually disproves their own case. Those
17 were real enterprises. They had continuity, unity, shared
18 purpose, and identifiable structure. This did not.

19 So then the government says, well, we can put them all
20 together because we have them disrupting court proceedings,
21 beginning with the challenge, the ill-fated challenge to the
22 jurisdiction of this court. The bizarre challenge. You heard
23 what the defendants were saying in court. You can look at those
24 pleadings.

25 The notion that somehow the Uniform Commercial Code,

1 which deals with the commercial relations between people in the
2 United States, the notion that it somehow has anything to do with
3 criminal law is just completely bizarre. It's a mind-bending
4 theory that didn't get very far anywhere. As Judge Davis will
5 tell you, he denied the motion. This is a theory that you heard
6 began with white supremacists and tax protesters and ironically
7 has been adopted by inner city blacks in the prisons in Maryland.
8 It's been sold to them as a bill of goods.

9 But the government desperately needs to tie these
10 people together. So they say this is proof of an enterprise.
11 This is proof of a drug conspiracy and an enterprise? Something
12 that happens two or three years after they all get arrested?
13 It's a measure of the government's desperation, that they would
14 bring this before you and claim that.

15 This proves a conspiracy? Something where Shelton
16 Harris says to the Court, I'm a live flesh and blood man. He
17 repeatedly tells the Court, I don't understand. I do not
18 understand what's going on. And something for which neither he
19 nor any other defendant in this case was held in contempt by this
20 court.

21 And I ask you, ladies and gentlemen, you listen to that
22 tape. If you listen to it again, ask yourself, if you don't
23 detect what I detect in that tape, which is that Judge Davis
24 didn't seem all that upset by it. Listen to what Judge Davis and
25 listen to his voice during the course, during the course of that

1 tape.

2 The government so overreaches that it includes this
3 bizarre set of events, why? Because it's the only place they can
4 find where all four of these guys were together doing something.
5 And gee whiz, I wonder how often that happens in a criminal case
6 where four defendants are in it together? I wonder why, just
7 because, why don't they charge them with conspiring because they
8 all pled not guilty? That's the same thing. Why not?

9 Why don't they charge them because they all filed the
10 same motion to challenge the jurisdiction with respect to this
11 particular statute that we've been talking about? Instead, what
12 they have is Mr. Harris's words -- I do not understand.

13 That they would waste your time with this claim to me
14 is somewhat incredible.

15 Given the peculiarities of this law and how complicated
16 it is, I'm trying to explain it to you, Mr. Hanlon tried to
17 explain it to you, Mr. Lawlor tried to explain it to you, the
18 Court's going to try to explain it to you. Given the peculiarity
19 and complexity of this law, I don't find it surprising that Mr.
20 Harris would stand in the well of this court and repeatedly say
21 to the judge, considering the jurisdiction of the court, I do not
22 understand.

23 Now, there's some evidence I'd like to talk to you
24 about with respect to the specific crimes here that Mr. Harris is
25 alleged to have been involved in, the McCafferty/Brown murders.

1 The government says, Well, the absolute proof, we've got his
2 print. Sometimes we tend to call it a fingerprint. It's really
3 not a fingerprint. It's a palm print and it's not a whole palm
4 print. It's a partial palm print. You can see it on this
5 MB-30-A, this little card here. It's a very small part.

6 And Ms. Lansey from the police department said it's
7 this part of the palm right here, the bottom part of the palm
8 right here, that you find there. Someone has to touch like that
9 to get it to go there. That's what she said it is.

10 But she had no personal knowledge of where the print
11 was taken from. The card says it was taken from the driver's
12 side rear door glass. But we don't have a picture. Nobody took
13 a picture of the latent after they dusted it on the door. That's
14 the usual procedure. But nobody did that in this case. They
15 were probably hurried. They had a lot of work to do. I don't
16 fault anybody for not doing that, but it wasn't done.

17 So you don't know, other than what this card says, it
18 was actually taken off the window. You remember Detective
19 Giganti testified in the grand jury that it was taken off the
20 rear bumper of the car.

21 I don't know where it came from. Ms. Lansey couldn't
22 say where it came from. All she could do was tell you what's on
23 this card.

24 The other thing she couldn't tell you was where on the
25 window the print was found because the technician didn't orient

1 the card with an arrow here, an arrow here, pointing north/south,
2 east/west. So you don't know if it's taken from the bottom of
3 the window, the top of the window, the up side, the down side.
4 Because it's not oriented, you don't know whether the print was
5 made this way or this way or this way or this way. You can't
6 tell. There's no way to tell because all it is, it's just a
7 little print. You can't really tell where it comes from.

8 Now, what does that mean? Well, we asked Ms. Lansey,
9 you know, well, what does that mean? Does that mean, you know,
10 that somebody could have put that print on the card by doing this
11 and touching the window? And she said yes. And could it mean
12 that somebody could have put the print on the card by leaning
13 back like this against the door? She said yes.

14 Now, that may seem bizarre to you. But because we
15 don't know where it was on the window, nobody can tell. Nobody
16 can tell you where it came from.

17 Now, what does that mean? Well, at best, the print
18 places Shelton Harris outside the car. Well, we know he was in
19 that neighborhood. We know he lived in that neighborhood or at
20 least he hung out in that neighborhood, according to the
21 government's evidence. So we know he was there. That doesn't
22 mean that he was in the car and he was the shooter.

23 Now, Mr. Harding said, oh, yeah, he was the shooter.
24 He was in the car and then he went out that driver's side door
25 and he slammed the door with his hand and that's how the print

1 got on there. And then that slamming caused the car to roll down
2 the hill and crash.

3 Well, I don't know about you, ladies and gentlemen, but
4 if I'm slamming the door, I'm not slamming it with the heel of my
5 hand going back. You would leave more of a print if you hit it
6 like that. Doesn't make any sense to me, ladies and gentlemen.
7 I just submit to you that Mr. Harding's explanation of this
8 doesn't make any sense.

9 Now, we have the evidence, Mr. Harding wants you to
10 believe that the killer was in the middle of two seats, that
11 there was one killer in the car, that it was Mr. Harris, and that
12 he shot first to the left and then to the right. And from the
13 juxtaposition of bodies you could tell that, putting the killer
14 in the middle of the back seat.

15 But then the killer had to get out of the car. Well,
16 there was this bloody console sitting right next to -- you saw
17 the picture -- right there between the door, where the print
18 supposedly was found in the car. So how does the killer get over
19 that bloody console and then get the door open, which was locked?

20 We know from the expert that that door, because the car
21 was locked when it was found and the engine was running, and
22 because the car lock would not automatically, it wasn't one of
23 those cars like you have today where once the car starts moving
24 the doors all lock -- that didn't have that. That Infiniti Q-45
25 of that year did not have that device.

1 So somebody had to lock the door. Either Mr. McCaffity
2 locked the door when whoever got in the car got in the car with
3 him. Doesn't make much sense, given the nature of the deal they
4 were doing. Mr. McCaffity was supposedly buying a gun or
5 something, that you would look the person in the car with you.

6 So either he locked the door or the assailant, after
7 committing the murders, reached over and locked the door and then
8 had to crawl over that console, pick up the flipper, open the
9 handle, open the door, and get out.

10 You would have left more prints than were left there
11 and you would have left DNA at some point.

12 Now, they vacuum the car. There's an exhibit that you
13 can look at that shows you what they took from the car. It is
14 Harris 8. You can look at that. It shows you they vacuumed the
15 car. They took the carpet out of the car. They have the
16 console. They never ran any DNA. Never bothered to try to find
17 any DNA. Never took any DNA from Mr. Harris. They took it from
18 some of the others but never from Mr. Harris. They never checked
19 any of that DNA against anything.

20 Now, they did it when they wanted to find that the
21 blood on Mr. Mitchell's knife, two years after they took the
22 knife from the Hammerjacks incident, they went and did DNA
23 analysis. And they said they had these new tests they could do.
24 And the person from the, from the Baltimore City Police
25 Department, the gentleman who was their DNA expert, came in and,

1 Ken Jones, he said, you only need a small amount of DNA and you
2 can get it any time the body touches anything.

3 But nobody bothered to do the carpet. Nobody bothered
4 to check these vacuums. Nobody bothered to check the console for
5 DNA. Nobody ever did that in this case. They were just
6 satisfied to say to you, we're going to bring Mr. Dobropolski and
7 the others in here and let them testify. And the jury will buy
8 it because of the horrible nature of the crimes. The jury will
9 buy it.

10 Ladies and gentlemen, as Mr., I think, I keep
11 forgetting his name. My brain is just not what it used to be.
12 Mr. Jones. Mr. Jones said that the test is good, accurate to one
13 in a quintillion, but they didn't bother with it. They didn't
14 bother to do that for you. They just want you to rely on the
15 eyewitness testimony, the testimony, the hearsay testimony of Mr.
16 Montgomery, Mr. Hayes and Mr. Dobropolski, and have them spin
17 their yarn and hope that you'll buy it.

18 The bottom line was, whoever was in that car had to
19 leave a lot of other things around and nobody bothered to check
20 for it.

21 And finally on that murder, what about Dwight? Little
22 Pill, I think was his nickname. He's the guy who Hayes said took
23 the .38. And he never saw him again and never heard from him
24 again. Well, where's Dwight? We haven't seen or heard anything
25 about Dwight in this case.

1 What about Dwight? Why isn't Dwight a suspect in this?
2 Why isn't Dwight the one who could have done this? We just don't
3 know. I submit to you that there's enough doubt there, ladies
4 and gentlemen.

5 Now, I've already gone over the Wyche evidence with
6 you. I believe the evidence shows that Mr. Harris was not in
7 that car. You can talk about all the different ID's that they
8 got from everybody. But the fact remains that Natasha Wyche
9 knows Mr. Martin and Mr. Mitchell and she said it's them. Mr.
10 Hayes, who hates Mr. Harris, comes in and says that the same
11 things that Natasha Wyche says Mr. Martin is saying, that's Mr.
12 Harris saying them. That's a reasonable doubt in and of itself.

13 Consider the words on the tape. I'm coming to your
14 house, Shorty, tells w Mr. Harris was not there.

15 And it's nonsensical to think that the speaker would
16 say to the person next to him, I'm calling your house. Why would
17 he do that?

18 The most common sense application, that's what we're
19 about here, is you applying your common sense. That's what
20 juries are all about. Apply your common sense to the facts. And
21 I think if you do that, you will find out that, you will believe
22 and come to believe that Mr. Harris was not in the car that
23 night.

24 And in addition, all the stuff about rap, as I told
25 you, there's a lot of references that the government says, well,

1 this is clearly the McCaffity murder. There are no references in
2 the rap business, specific references to the Wyche murders. If
3 Mr. Harris was supposedly involved in them and writing about this
4 stuff, you would find those, I believe, if you believe the
5 government's case.

6 The bottom line is even if you think that Mr. Harris
7 was involved in that murder, it wasn't, in the McCaffity/Brown
8 murder, it wasn't about an enterprise. It was about a personal
9 vendetta of Mr. Mitchell. Has nothing to do with the rest of
10 these people. And that's not the kind of thing that allows you
11 to convict Mr. Harris in this courtroom.

12 What you should tell the government is, sorry, take it
13 up Calvert Street to the Baltimore City Circuit Court. That's
14 where it belongs.

15 Now, in this case you have a gun charge. And I can't
16 remember all the counts in this indictment. But I think it's
17 Count 16, 17. Maybe 18. I don't know. It's one of the last
18 couple counts. 17, 18, or 19. It's one of those three. That's
19 a real federal charge. That's a charge that belongs in this
20 courtroom. You don't need the RICO and you don't need the drugs.
21 That's a charge that belongs in this courtroom.

22 The evidence in this case is that Mr. Harris didn't
23 carry a gun; he carried a knife. That's what Mr. Dobropolski
24 said. That's what, that's what Mr. Hayes said. He pulled a
25 knife on him and then Hayes pulled a gun on him.

1 The evidence is that the gun was found with Mr.
2 Harris's belongings in that little closet between the, the living
3 room and the kitchen, I guess, where the family's cleaning
4 supplies were and where their three-year-old children's toys
5 were. So there would have been occasion for the family to go in
6 there. Nobody's going to leave a gun in that position. Not even
7 Mr. Harris, nobody is going to leave a gun in that position.

8 I suggest to you, ladies and gentlemen, this is a real
9 federal crime and you, if you find beyond a reasonable doubt that
10 that gun was Mr. Harris's, then you should convict him of that
11 crime. But the rest of these crimes are not real federal crimes
12 and you should not convict him of those other crimes.

13 And in this case, the government still has the burden
14 of proof to prove to you that that was Mr. Harris's gun. I
15 submit to you if it was, he wouldn't have left it where it was.
16 He would have been carrying in, just like everybody else carries
17 their gun.

18 Mr. Harding tries to get you to say, well, he wouldn't
19 carry his gun to Parole and Probation. Well, he wouldn't carry
20 his knife there, either. The evidence was he took a knife and he
21 left it in the trash can outside. Could have done the same thing
22 with a gun. If Mr. Harris owned a gun, that's what he would
23 have, it would have been with him. If that was his gun, it would
24 have been with him.

25 And ladies and gentlemen, I suggest to you that there's

1 enough evidence there to find a reasonable doubt that that gun
2 belongs to Mr. Harris.

3 Let's talk about the witness retaliation charge.
4 Somehow or another Hayes is up in lockup. I don't fault Mr.
5 Harding for that, even though I'm sure he thinks I do. I don't
6 fault him for that. He ends up there. A one in a million chance
7 that he ends up in the same cell with Mr. Hayes? I find it
8 strange that Mr. Hayes gets arrested on a Friday and they got to
9 bring him to the federal courthouse the following Monday morning
10 when he's got state charges. They could ordinarily just process
11 those state charges. When they're done, bring him here.

12 But think wanted him as a witness. They didn't believe
13 anything he'd said up to that point and they wanted him as a
14 witness. And so they wanted to get him here so they could talk
15 to him. That's what Detective Benson said in the grand jury. He
16 said, we were bringing him in to talk to him.

17 He said in cross examination here, maybe redirect
18 examination, I didn't really know, I was just sort of guessing
19 when I was in the grand jury but I thought that's why they
20 brought him here. But it makes sense, doesn't it? They wanted
21 this guy as a witness. They brought these federal charges
22 against him, I bet you specifically so they could get him back in
23 and put some pressure on him and talk to him.

24 And they bring him here that day and he ends up in the
25 lockup with Mr. Shelton Harris. And before he goes in the

1 lockup, if you look at that film, he's out there with Special
2 Agent Klas. He comes behind Special Agent Klas and goes past
3 him. And when that happens, Special Agent Klas is on the phone,
4 talking to Mr. Harding.

5 So Mr. Klas, Mr. Harding knows Mr. Hayes is going in
6 the lockup. I'm not saying they knew Shelton Harris was in
7 there. But I am saying that it's possible that what they wanted
8 was to interview Mr. Hayes that day. And moreover, what they
9 wanted, what they hoped, if they knew Mr. Harris was there, that
10 maybe they would get a statement from him, like they tried to do
11 with Mr. Dobropolski and could never get it.

12 I'm not saying, Mr. Harding would never send him in
13 there to get beat up. That's just something Mr. Harding would
14 never do. And I'm not saying that. And to the extent that
15 anybody thinks I am, that's wrong. And I hope he doesn't think
16 that's what I think, because I don't. But I do find it strange
17 that he ended up there and it's something worth commenting about.
18 I just can't figure out how that could have ever happened.

19 More than that, I want you to look at that film again
20 when you go in there. I want you to look, and it's better to
21 look at it if you look at it right up close on a computer, if you
22 have that ability to do that, and I don't know whether you will.

23 But I want you to look at that film. And I suggest to
24 you when you look at the film you'll see that Mr. Harris gets up
25 and comes over to where Mr. Hayes is sitting. And the issue,

1 then, is who throws the first punch. And I want you to look
2 carefully at that. If you believe beyond a reasonable doubt that
3 it was Mr. Harris that threw that first punch, then you should
4 convict him of that crime. But if you don't believe beyond a
5 reasonable doubt after looking at it that he threw the first
6 punch, and I suggest to you what you see is Mr. Hayes's fist
7 coming out first, then you can't convict Mr. Harris of that
8 crime.

9 And I don't know what evidence there is that Mr. Harris
10 knew that Mr. Hayes was cooperating. He may have thought Mr.
11 Hayes was talking on the street. I mean, among other things, the
12 government relies on Stop Snitching. It called out, who was it,
13 TM on Stop Snitching. There's no calling out of Mr. Hayes on
14 Stop Snitching. That doesn't happen.

15 So I suggest to you, ladies and gentlemen, that they
16 want you to believe that it's Harris calling out those who are
17 snitching, but he doesn't call out Mr. Hayes on Stop Snitching.

18 Now, you heard some evidence, you heard some talk
19 yesterday about credibility. Let me talk a little bit about
20 credibility with you. And I know I'm probably, if I'm not over,
21 I'm getting close. So I'll do my best, Your Honor.

22 There's the good guys in this case. There's the
23 emergency medical techs, the fingerprints, the DNA, all those
24 people who just do their job every day. They get up and do their
25 job. They come to court and testify. Nobody, nobody questions

1 their testimony.

2 Then there is the police and federal agents. They're
3 good guys, too. They have more than a rooting interest in this
4 case. But they, they see this case as a vindication of their
5 beliefs and conclusions. And they're all good intentioned and
6 they worked hard to put the case together. They truly believe in
7 what they've done here.

8 But I suggest to you that they have a definite bias.
9 And it comes out. It comes out, as an example, in what TFO
10 Benson did with the cell phone analysis. By and large his
11 testimony was pretty straightforward. But on the cell phone
12 analysis when he was on direct examination, he knew about this
13 discrepancy in the times and he didn't tell you about it. They
14 waited to see if we would bring it out on cross.

15 That, ladies and gentlemen, I suggest is not the way
16 the game should be played. He knew all that should have come out
17 and it didn't.

18 Now, I'm not going to go through that analysis again.
19 We've already been through that. But I suggest to you that
20 that's just wrong. That's overreaching when you do something
21 like that. I think "overreaching" is the word that Mr. Lawlor
22 used yesterday.

23 I mean, why do that? Why do they have to seek every
24 possible advantage? Because they fear that you'll see the
25 weakness in their case, because they see it. They see it.

1 I'm curious about something else in this case.
2 Detective Niedermeier testified that when he met Mr. Dobropolski,
3 and I believe in his opening statement Mr. Harding said that
4 Niedermeier didn't know anything about this case until
5 Dobropolski came on board and he went to see him and Dobropolski
6 told him that it was Shelton Harris.

7 And the evidence in this case is that Mr. Niedermeier,
8 Detective Niedermeier, when he went to see Mr. Dobropolski, had
9 a, had an array, a photo array that included Mr. Harris's
10 picture. I don't know how in the world that comes about, if it's
11 accurate, that he learned about Mr. Harris from Mr. Dobropolski.
12 That just doesn't make any sense to me.

13 Is that overreaching? I don't know. I don't know what
14 it is but it's a very strange factor that is in the record of
15 this case.

16 Now, more overreaching? I talked about them already.
17 The use of the word bup or buc, buc, buc, versus that I think
18 you'll hear in the tape, buc -- bup, bup, bup, which is what
19 Detective Benson heard and read from a transcript way back when
20 he testified in the grand jury, before the government formulated
21 its case.

22 More overreaching, there's the rap lyric about
23 introducing Whoodi, as Agent Klas says, to the afterlife. Whoodi
24 is W-H-O-O-D-I. I don't know how many of you would pronounce
25 that Woody. I pronounce it Wodey. That's the way it's

1 pronounced in the rap and hip-hop community. That's what the,
2 what Mr. Cook said to you. He said there are numerous references
3 in rap songs nationwide to the term Whoodi and Whoodi is a
4 well-known term. It means friend, homey, someone you know. It's
5 a term used all over the country. All you got to do is get on
6 Google and internet it and you'll find it. He said there's even
7 a cartoon with a character called Whoodi.

8 For the government to stretch to have Mr. Klas
9 pronounce that as Woody is overreaching as far as I'm concerned.
10 These are just a few of the questions that arise from the
11 testimony of some of the interested parties.

12 Then there's the, for want of a better word, the bad
13 guys, as I would call them. They're the Chris Dobropolski's, the
14 Will Montgomery's and the Rodney Hayes's of this case. And I'm
15 not going to go over everything Mr. Lawlor went over with you
16 yesterday. But I once heard a judge describe the process of how
17 people become witnesses in federal cases, as the government uses
18 what they call coin of the realm. The currency used in federal
19 prosecutions.

20 It's in evidence for many of the cooperators here that
21 the sentences they face in federal court are far greater than
22 what they would get in state court, and that these people,
23 Montgomery and Reynolds and Hayes, they get deals, I think, I
24 could be wrong, at least some of them, maybe not all of them, in
25 state court where the sentences are less and where they have a

1 possibility of parole, where you don't have that in federal
2 court.

3 Each of these men has a deal with the government
4 involving the sometimes quite substantial reduction in the amount
5 of time they face. And the government places a lot of emphasis
6 on witness retaliation in this case. How many times have we
7 heard about Stop Snitching? And what they say is that people are
8 out there trying to intimidate people into not telling the truth.
9 That's the premise behind the government's feeling about Stop
10 Snitching. And that's an assumption.

11 The problem with that assumption is that it assumes
12 what all these witnesses are saying is the truth. And it
13 discounts the notion that some, perhaps many of these
14 cooperators, as they are called, are stretching the truth in
15 order to earn some of that coin of the realm.

16 Does the government get these people to lie? Of course
17 not. Mr. Harding wouldn't do that. Mr. Hanlon wouldn't do that.
18 But truth is, in many ways, in the eye of the beholder. Truth is
19 a relative term. One man's truth might be another man's lie.
20 And the process for arriving as to who gets to earn a deal, who
21 gets to earn some of that coin of the realm contributes to the
22 problem.

23 You will recall the government chastising the defense
24 for calling Mark Herbert. What they said essentially was, You
25 told us something we didn't like and we told you that we didn't

1 believe you.

2 And we want you to contrast him with Rodney Hayes.

3 Well, I want you to contrast him with Rodney Hayes.

4 Herbert admits that he's friendly to Mr. Harris and Mr.
5 Mitchell. He admits that he came here without a subpoena and
6 doesn't have the deal by the government. So the government says
7 he must be lying, he came in here. Well, the other, Mr. Hayes,
8 he says, I saved myself ten years in jail. I hate Shelton
9 Harris. But because he says incriminating things about Mr.
10 Harris and Mr. Mitchell, he must be the one telling the truth.
11 The logic escapes me. Forgive me, but it does.

12 And the process creates that. We have this proffer
13 letter. You've heard about proffer letters. There's proffer
14 letters and then there's plea letters. And a proffer letter is a
15 letter that initiates that dance that takes place between a
16 potential witness and the government. Someone the government
17 might think has information.

18 The proffer is a session with the government where a
19 person facing a serious charge gets to come in and tell his story
20 under a grant of immunity. Nothing he says will be used against
21 him. And if and only if the government likes the story, then
22 he'll get a deal. He'll get some of that coin.

23 Well, these people are smart. Mr. Harding and Mr.
24 Hanlon don't ask them to lie. They don't have to. These people
25 are smart. By the time of their proffer, they and their lawyers

1 have talked to the government, they've talked to the agents.
2 They know what the case is all about. And anyone who really
3 wants a door, wants a deal knows how to jack up his story in
4 order to sell it to the government. If the story doesn't help
5 the government, then they have no incentive to spend that coin of
6 the realm. They have no incentive to give him the deal.

7 No one who is ever saying what the government doesn't
8 want to hear gets any of that coin. The government will just
9 say, Well, they weren't being truthful. But that's the rub. If
10 it doesn't fit their preconceived notion, then you don't get paid
11 any of that coin. Talk about a carrot and stick.

12 Now, the government will come back and they'll say, oh,
13 but you could be comfortable because they have perjury hanging
14 over their heads if they're lying. But who brings the perjury
15 charge? The government.

16 Then the government says to you, well, it doesn't
17 matter. We bring the perjury charge but the Court decides,
18 that's what the plea agreement says, the Court decides. But
19 that's misleading, also. Why? Because the government is not
20 going to come initiate the process with the Court as long as the
21 cooperator says what they want to hear. I suggest to you that
22 will never happen. The government won't come in and say the
23 cooperator lied as long as that cooperator was saying what they
24 want to hear.

25 So your common sense tells you that a cooperator is

1 never going to say anything the keeper of that coin doesn't want
2 to hear.

3 And most importantly, as Mr. Lawlor told you yesterday,
4 the government is the only one with a checkbook. We don't have
5 that. And f we paid somebody to come in here, you wouldn't
6 bother weighing their credibility. You wouldn't bother doing any
7 of that. You would just say, I'm not believing a word they say.

8 How much is a year in jail worth? Depends. 10,000?
9 50,000? 100,000? I suppose it depends on how much you have to
10 spend.

11 Mr. Montgomery's getting a ton here, as is Mr. Hayes.
12 And they say Mr. Dobropolski didn't get anything. But he got out
13 four years early. He lied here. He said, I didn't really want
14 to get out, I wanted to wait till it was all over. But he wrote
15 the letter to the judge saying, I won't tell my story unless I
16 get out. That's what he said.

17 Of course, the government said, well, he just wanted to
18 be out of prison so that when he was telling his story he
19 wouldn't get beat up, he wouldn't get intimidated or whatever you
20 call it. But ladies and gentlemen, he got out four years early.
21 If he had the good sense to keep his nose clean, he would have
22 stayed out. So don't let the government stand here and tell you
23 he didn't get anything for it.

24 When you put this in all those terms, does it make you
25 comfortable, are you comfortable by proof beyond a reasonable

1 doubt that what these people are saying is the truth? And a
2 little honesty is invoked here. You should consider the notion
3 that what's going on here is these people are bought and paid
4 for.

5 Dobropolski. Here's a guy who crawls out of the
6 woodwork, claims Shelton Harris confided in him because of his
7 rep, and told him all these things. And then he wants to get out
8 of jail. Wants desperately to get out of jail. So he writes the
9 judge and eventually ends up talking to the government. They
10 take him out. They go right away. They rush there. They take
11 him to the judge. Judge Byrnes, if you remember the colloquy,
12 Judge Byrnes was reluctant to let him out but he let him out.
13 And he put some tight reins on him but he let him out.

14 Almost as soon as he got out, he started using drugs.
15 Even while he was cooperating with the government, the evidence
16 is he was using drugs.

17 What was that cooperation? He was trying to get Mr.
18 Harris to commit on tape to say the things that he says Harris
19 told him in jail. And there's some seeds of truth in what he
20 says, of course there are, because Mr. Harris was writing the
21 raps. So he could see what Mr. Harris was writing when he was
22 jail. He didn't have to be told that by Mr. Harris. Mr. Harris
23 was playing the songs and writing the raps.

24 And anybody like Mr. Dobropolski could spin a story
25 from that. But we know he had a motion to reduce his sentence

1 coming up in a year and so it was important for him to get that
2 information so that he could go forward.

3 So they get him out of jail. They get him out of jail.
4 And what does he do? He immediately starts to tape Shelton
5 Harris. There's at least four personal, face to face. And none
6 of them worked. Amazing in this day and age that the government
7 can't put a tape recorder on somebody that will actually work.
8 But we know they had tape recordings that did work when you call
9 them on the phone. But Mr. Dobropolski says, Well, criminals
10 don't talk on the phone and, therefore, I never tried to get him
11 to talk. I didn't really try to get him to talk on the phone.

12 Well, that's not what Special Agent Ellington says. He
13 said he learned a lot about what he does about his business -- He
14 was the DEA expert -- from phone taps, from listening to
15 criminals talk on the phone. So Mr. Dobropolski's statement
16 doesn't make any sense.

17 So the one time that you have a conversation, you can
18 hear a conversation that we had in hand, the personal
19 conversation, there's a handwritten note from Mr. Dobropolski
20 that says, I told him that somebody told me they killed Woody and
21 Shelton Harris said to me, somebody trying to claim my work? He
22 told Mr. Giganti that story, Detective Giganti. And he wrote in
23 his report, Somebody trying to claim my shit? You all remember
24 that.

25 But when you listen to the tape, what did you hear? He

1 said that? He said that? What does that mean? That's certainly
2 not a confession. It's certainly not anything like Mr.
3 Dobropolski and Detective Giganti said it was.

4 And then you have the one phone --

5 THE COURT: Just a moment. Toni, come around. I'm
6 sorry, Mr. Martin. You're pretty far over.

7 MR. MARTIN: Your Honor, I need about five minutes. Is
8 that all right?

9 THE COURT: Yes.

10 MR. MARTIN: I would have said ten but I know you'd say
11 five. I suggest to you that's evidence that Mr. Dobropolski's
12 lying. He's lying to Detective Giganti and he's lying about what
13 happened here.

14 And then we have the one phone tape. You may have
15 thought it was strange. He said there was the phone tapes were
16 always good. There was one phone tape where he said that Harris
17 agreed to do a robbery with him. And he said it was on the phone
18 tape. So I got the phone tape and we played it for you and
19 miraculously it was blank. The one time he says that he captured
20 something on tape, it was blank.

21 I suggest to you, ladies and gentlemen, in addition to
22 all that, that Detective Giganti said they tried a dozen times to
23 tape him before the first taping in October. I don't know
24 whether that actually happened or not. But that's what Detective
25 Giganti said. Where is all that evidence? They could never get

1 corroboration.

2 But Dobropolski is relied upon by the government as
3 someone they tried to recruit him into this business? Well, if
4 he was trying to recruit him, it was a strange way to act in
5 October, November, December and January of '03 and '04, when Mr.
6 Harris continually couldn't even get in a car to come meet this
7 guy he was trying to recruit?

8 The evidence suggests otherwise, ladies and gentlemen.
9 Mr. Harris was trying to stay away from this guy. He didn't want
10 any part of this guy and he wasn't trying to recruit him into
11 anything.

12 Rodney Hayes was adequately covered by Mr. Lawlor
13 yesterday. I don't really need to go over that except for one
14 thing.

15 The government said yesterday about this gun. There's
16 this .40 caliber gun that the government says was the gun used in
17 the Wyche murders. And it turns out to be a gun that the
18 government says, the transition is this. Mr. Hayes says that Mr.
19 Herbert had given his gun to Mr. Mitchell. And then Mr. Mitchell
20 had in turn given him a dirty .40 caliber, and that that dirty
21 .40 caliber Mr. Hayes then, Mr. Mitchell, Mr. Herbert was holding
22 it for him, TM was holding it for him. And he eventually gave it
23 to Mr. Hayes who after a week sold it on the street. And the
24 government says that's the .40 caliber that was used in the Wyche
25 brothers murder.

1 Well, ladies and gentlemen, I went back and I got the
2 transcript. It's rare. Usually you don't have a transcript in a
3 trial. I got a portion of the transcript from this case in front
4 of you. And I've read the transcript.

5 And what happened was on cross examination Mr. Hayes
6 very clearly said that his brother had the gun for two months
7 before he gave it to him, and that he gave it to him in March or
8 April of 2002. Well, if that's the case, you go back two months,
9 Mr. Mitchell no longer had this .40 caliber, assuming all this is
10 true, when the Wyche brothers murder went down.

11 And I suggest to you, ladies and gentlemen, that the
12 evidence in this case is that that gun was gone by the time of
13 the Wyche murders. Mr. Mitchell didn't have it. And for the
14 government to suggest to you here that that was the .40 caliber
15 used in the Wyche murders, which somehow ties all of these
16 together, is just simply wrong.

17 And another thing Mr. Hayes said. He said that he saw
18 Mr. Gardner and Mr. Mitchell and Mr., Mr. Martin together one
19 time during this time period. But Mr. Harris wasn't there, of
20 course. But on cross examination, when asked if he knew Weaze,
21 he said, I heard of him. So if that's the case, then he could
22 not have seen Weaze with Bo and Goo in Park Heights because he
23 didn't even know who he was. And only when he was facing the 15
24 year federal charge did he then say Mr. Harris and Mr. Mitchell
25 were involved in this conspiracy, only after he got some of that

1 coin of the realm.

2 Mr. Lawlor talked about Mark Herbert and I don't really
3 have anything more to add to what Mr. Lawlor said about that.

4 I did already tell you about the comparison. Compare
5 how the government treats Mr. Herbert and Mr. Hayes. You know,
6 the guy who hates somebody and comes here without a subpoena is a
7 liar but the guy who comes here with a subpoena and a deal is
8 telling the truth. But the guy who likes somebody and comes here
9 without a subpoena is liar. The logic escapes me. And there
10 were instances of a number of lies that Mr. Hayes told in the
11 grand jury.

12 Now, ladies and gentlemen, if nothing else, the recent
13 election in this country shows that we as a people respect the
14 rule of law. We can get beyond stereotypes and prejudice. We
15 can follow the best traditions of our national heritage.

16 That's what jury service is all about -- honoring your
17 oath. It's a special part of that. Not being so inflamed by the
18 evidence here that you are inclined to just say, Oh, to heck with
19 it, I'm just going to convict these people, I don't really care
20 what the evidence is. That's not something we as Americans do.

21 This prosecution is founded, founded upon a very
22 special set of federal laws -- the RICO statute and the
23 conspiracy statute. And proof beyond a reasonable doubt that
24 this specific enterprise and this specific conspiracy existed is
25 absolutely required in order for you to convict these people on

1 Counts 1 through 16.

2 I apologize, ladies and gentlemen, for going over, for
3 taking so much of your time. I know that you will consider the
4 things that I say, the things that Mr. Hanlon says, the things
5 that the other defense lawyers say, and the things that Mr.
6 Harding says, that you will look closely at the evidence,
7 particularly at whether the government has proved this evidence,
8 this conspiracy and this enterprise, the one they charged and not
9 something else, which I submit to you is what they've proved.

10 And I know that you'll honor your oath to be fair and
11 impartial. Shelton Harris can ask for no more from you. Justice
12 demands no less. Thank you.

13 THE COURT: Thank you, Mr. Martin. Ready, Mr. Pyne?

14 MS. RHODES: Your Honor, the DOAR system, our monitor
15 and the government's monitor are not on. I think just the
16 jurors, and I'm not sure about --

17 THE COURT: Okay. We'll get help. Are you going to
18 use the DOAR, Mr. Pyne?

19 MR. PYNE: I was going to briefly, Your Honor.

20 THE COURT: Okay.

21 MR. PYNE: I personally would appreciate just a five
22 minute bathroom break.

23 THE COURT: You're asking a lot.

24 MR. COBURN: Your Honor, my client's got the same
25 request, if possible.

1 THE COURT: All right. Ladies and gentlemen of the
2 jury, we'll take a ten minute recess. Please leave your note
3 pads on your chairs. Have no discussion about the evidence or
4 about the case. Jury's excused for ten minutes.

5 (Jury exits the courtroom.)

6 THE COURT: We'll stand in recess for ten minutes.

7 (Recess at 11:18 a.m.)

8 (Defendants enter the courtroom.)

9 (Jury enters the courtroom.)

10 THE COURT: Mr. Pyne, whenever you're ready, sir.

11 MR. PYNE: Thank you, Your Honor. Good morning, ladies
12 and gentlemen of the jury. Before I get going here, I just
13 wanted to thank you on behalf of myself, on behalf of Mr. Crowe,
14 my co-counsel, and on behalf of Shelly Wayne Martin for all the
15 time and effort that you've put in on this case.

16 We all have to be here. You all were basically drafted
17 to this. But we wanted to say that we appreciate all the
18 attention you've paid to this case, the time. You've taken
19 copious notes.

20 I said to co-counsel yesterday when they were talking
21 about certain testimony, I said, I don't have this in my notes,
22 do you have it in your notes? And I know that I've noticed that
23 you've all been taking notes. I see some of you have several
24 pads of notes. So I know you have at least as good notes as I
25 do. So I'm going to rely on your notes much more than my own.

1 I'm more of the Mr. Lawlor notetaking school. I don't
2 take that many. I see that you are well prepared for that. And
3 I take great solace on that, your relying on your recollections
4 of the evidence.

5 Mr. Crowe, when he gave opening statement, told you
6 what he thought the evidence would prove in this case. Now in
7 closing argument I get to come before you and argue what I feel
8 the evidence has shown and try to tie that to the indictment in
9 this case, the charges that Shelly Wayne Martin is facing. And
10 you'll wed that together with the law that Judge Davis will
11 provide you after all these closing arguments are done.

12 I'd like to do that by starting off with the
13 indictment. The first count of the indictment is the RICO
14 conspiracy count. This is a charge that was designed, as you've
15 heard, basically, to try to address the racketeering activity of
16 organized crime type, type organizations. It's very complicated.
17 Lawyers have a tough time trying to understand it. And I'm
18 explaining it to myself as much as to you, as we go through this.
19 Because I'm often having to go back and say it myself, Okay, what
20 exactly does the government have to prove to show this?

21 The allegations in the first count are that Mr. Martin
22 and the other three codefendants, in fact, were part of an
23 organization that had a purpose of committing murder, robberies,
24 and drug trafficking.

25 Mr. Hanlon yesterday put out a nice little chart for

1 you that showed the four things that they have to prove. They
2 have to show an enterprise. They have to show that the
3 enterprise was involved in interstate commerce, that the
4 defendants were employed by or associated with this enterprise,
5 and that, in fact, each of the defendants willingly became a
6 member of the conspiracy that was involved in this enterprise.

7 First, let me address the enterprise. Again, what is
8 exactly an enterprise? What does the government have to show to
9 show you that there was a enterprise.

10 Now, Judge Davis will instruct you that Shakedown
11 Entertainment is not the enterprise in this case. That is not
12 the enterprise. What does the government have to prove?

13 They must show three things in particular. They must
14 show an organizational structure, formal or informal. But they
15 have to show organization. Secondly, they have to show a common
16 purpose to this enterprise. And the third thing they need to
17 prove is that this enterprise had a continuing unit that operated
18 throughout the term of this enterprise, if you would. All this
19 enterprise has to go towards achieving the common goals set out
20 for the enterprise.

21 So let's go through the three things they need to
22 prove -- the organization, the common purpose, and the continuing
23 unity. Did they show a continuing unit in this case?

24 There was really nothing continuous about the four
25 individuals in this case. Granted, three of the individuals were

1 childhood friends. They grew up together, knew each other for
2 long periods of time. Does that make them a continuing unit?
3 What continuing unit was there with all the different
4 incarcerations that took place in this case?

5 You heard that Mr. Martin and Mr. Gardner, in 1999,
6 were both incarcerated for long periods of time. During long
7 periods of time -- well, Mr. Mitchell started off in the Hickey
8 School. He then went to Nassau Junior College. And then he
9 enrolled for a semester in another college. He was out of town,
10 up in the New York area. Mr. Martin, Mr. Gardner are back here.
11 Mr. Harris, again, repeatedly does not get into the whole
12 organization until much later on.

13 Is this a continuing unit? And what period of time
14 does the government have to prove?

15 Now, the government has chosen to charge this
16 enterprise as lasting from 1994 through 2006. That is what the
17 government chose to charge in this case. That was totally within
18 their prerogative. They did not have to charge it that way.
19 They've chosen to say that this enterprise lasted that long.

20 Did they prove to you that there was a continuing unit
21 of these four individuals that lasted for that entire 12 year
22 period? And I submit to you that they did not. Between the
23 incarcerations, between Mr. Mitchell going to school, there was
24 no continuing unit in this case. Certainly not a continuing unit
25 that spanned from 1994 through 2006.

1 Mr. Hanlon said that they were there when they needed
2 to be for each other. I just don't think there's any evidence of
3 that.

4 Repeated incarcerations of the different defendants.
5 You don't see any of them coming to the aid of the others in any
6 way. I don't think any of the witnesses testified that they came
7 to each other's aid. I think Mr. Bacon had one time, when he
8 said he needed protection and received some help from Mr. Gardner
9 and Mr. Martin. That's the only testimony I recall. Again, go
10 through your notes, see what you recall.

11 But they are repeatedly being arrested. No one's
12 coming to anybody's aid. From what I remember of the testimony,
13 it was all, everyone is doing their own thing. Everyone is
14 basically watching out for themselves. And they help each other
15 out only when it was to their own mutual benefit to do so.

16 Now, what about the common purpose? Again, this is a
17 common purpose that has to span from 1994 through 2006. And that
18 is the time period chosen by the government. They say that the
19 common purpose, for one thing, was drug distribution. But the
20 evidence of drug distribution is very scattered. There's no
21 evidence that Mr. Martin dealt at all with drugs after 1999. He
22 was incarcerated for a handgun or firearm offense in 1999. And
23 there is no evidence whatsoever after 1999 that he had anything
24 to do with drugs, certainly not through the 2006 period charged
25 by this indictment.

1 There's no sharing of profits. Mr. Martin went into
2 that extensively. That's the problem with following up Mr.
3 Martin. He's so thorough. He's covered many of the points that
4 I want to go into. So I'm trying not to, again, cover the points
5 he's already covered.

6 But Mr. Martin and Gardner were arrested at different
7 times during, say, the 1996 through 1999. But there's no
8 evidence of any drugs after 1999.

9 And there's no evidence that Mr. Martin and Gardner
10 were really operating in concert. When it was -- they were not
11 operating in the same areas of Baltimore. They were not sharing
12 profits. It wasn't even clear whether or not they had a common
13 source. They are basically two independent contractors who, when
14 it's convenient, will take advantage of each other because they
15 are friends and have been friends for years. During that period
16 of time, Mr. Mitchell is not even around. And again, Mr. Harris
17 isn't even a consideration until much later on. There is no
18 common purpose that can be shown in regards to drug distribution.

19 Robberies. The government also points to robberies. I
20 don't believe there is any evidence that shows that Mr. Martin,
21 Shelly Wayne Martin, participated in any robbery in this case.
22 There was some testimony that he was present in a car when some
23 other individuals jumped out of the car and committed a robbery.
24 No evidence that he himself participated in any robbery in this
25 case.

1 The government also says, well, murders were a common
2 purpose. All the murders in this case took place within a
3 several month span in 2002. We're talking about a common purpose
4 that is supposed to span from 1994 through 2006. Murders clearly
5 is not a common purpose for this enterprise.

6 Look at the murders that were alleged in this case.
7 Did they serve a common purpose? The McCaffity killing. Did
8 that serve a common purpose for this alleged enterprise? The
9 Wyche murders. Did that serve a common purpose for this
10 enterprise? The Spence murder. How did that serve any common
11 purpose with this alleged enterprise?

12 The government has not shown a common purpose for this
13 enterprise that they're alleging.

14 And the third factor, we have the common purpose, the
15 continuing unit, is the organization. Did they show, however
16 informal, there was any organization at all to these four
17 individuals here? That's what we're concerned with, the four
18 individuals charged in this courtroom. Any organization
19 whatsoever?

20 It's funny that the government even presented you with
21 contrasting organizations through their own case. Eric Clash,
22 when he testified about his membership in the Rice brothers
23 organization. It was clear there was an organization, there was
24 a hierarchy. He knew he was part of an organization. I believe
25 he referred to it as the bubble. The people that were inside the

1 bubble. He did things outside the bubble but he was clear what
2 the bubble was, who was in it.

3 After something happened to one of the Rice brothers,
4 they had a meeting. It was decided what was going to happen. He
5 didn't necessarily agree with the decision but that is what was
6 going to happen. A hit was going to be put out once they figured
7 out who this individual was.

8 Ernest Reynolds. He told you about an organization. I
9 think he referred to it as a unit. If there was three of them,
10 he and Card and another individual, they each had their own shops
11 but they came together. And Card had a source for, I believe it
12 was heroin. And they all knew that by sticking together they
13 would protect each other. There was an organization. Everyone
14 knew about it. Ernest Reynolds knew he was a member of that
15 organization, knew they were providing common protection. And he
16 bought into the fact that, yes, I was working as part of the
17 unit.

18 Did any of these individuals operate with that
19 knowledge that they were, in fact, joining this enterprise and
20 were, in fact, part of an enterprise? The government has not
21 shown that in this case.

22 And again, not only do they have to show it, they have
23 to show it for this time period, 1994 through 2006, because that
24 is what they have chosen to charge in this case.

25 Not only must they show this enterprise with the three

1 factors I just discussed, they must show that each one of these
2 individuals joined this enterprise, knowingly, willingly joined
3 this enterprise and had knowledge they were doing so. Did they
4 present you with any proof of that, that they were aware that
5 this enterprise existed and they willingly joined it?

6 They must show that Shelly Wayne Martin knew of these
7 goals of this organization, knew that this enterprise existed, it
8 was an organization, that they were dealing in drugs, robbing
9 people, and murdering, and he knew that was going to go on and he
10 willingly became a part of that. Did they prove that beyond a
11 reasonable doubt? I submit to you they haven't.

12 Eric Clash, when he testified, he knew he was joining
13 the Rice brothers organization. He knew they had enforcers. He
14 knew that that, if someone welshed on a drug deal, that they
15 would have enforcers go out there and do what they needed to do.
16 He joined that organization and was a part of that.

17 Did the government prove Shelly Wayne Martin joined any
18 type of enterprise in this case? I submit to you they haven't.

19 In addition to showing that he knowingly joined this
20 enterprise, the government must also show this pattern of
21 racketeering activity. And they've alleged certain offenses. It
22 has to be more than one offense is basically the only
23 requirement. It has to be at least two offenses. So Shelly
24 Wayne Martin has to be shown to join this enterprise knowing,
25 knowing that at least two racketeering offenses are going to take

1 place. Did they prove that?

2 Mr. Martin is alleged in four of the racketeering acts.
3 Three of those involve the Wyche brothers murder. Of the four
4 acts, there is the murder of Darryl Wyche, the murder of Anthony
5 Wyche, the robbery of both Darryl and Anthony Wyche. Those are
6 three of them. And the fourth one is just the drug distribution
7 allegation, which is also a racketeering act.

8 What I'd first like to do is address the Wyche brothers
9 murder aspect of this and then I'll deal with the drug
10 distribution aspect because, really, there's two different drug
11 distribution counts. Mr. Hanlon went into this to some degree.
12 There's the racketeering act drug distribution and then Count
13 Eight is also just a bigger conspiracy to distribute drugs. Same
14 evidence, same things can be addressed at the same time.

15 First, the Wyche murder. The only tie to Shelly Wayne
16 Martin is this voice mail recording that contains two words that
17 you can hear loud and clear -- Shit, Wayne. That is a horrible
18 tape recording but the one thing that seems to come through loud
19 and clear to everyone is these two words, "Shit, Wayne", which
20 really don't fit in with the rest of the words there. I mean,
21 there's nothing really before it. There's nothing really after
22 it. No one responds to it. But you hear this "Shit, Wayne" in
23 there.

24 The government says that's proof positive, I believe
25 that was Mr. Hanlon's words, proof positive that Shelly Wayne

1 Martin is there. I submit to you that it's not.

2 I'd also submit to you that but for that "Shit, Wayne",
3 Shelly Wayne Martin would not even be sitting in this courtroom.

4 What happened? The Magginsons discover this recording.
5 They sit around and listen to it. Call their friends over.
6 Listen to this recording. Here what you see, listen, tell me
7 what you say. Dwayne Denham is called over. Natasha Wyche is
8 called over. They're all sitting around in a big room, playing
9 this recording over the speaker phone. And Dwayne Denham, I
10 believe, testified. Yeah, I was called over there. I started
11 thinking, Who do I know named Wayne? The only Wayne they could
12 come up with is Shelly Wayne Martin.

13 Dwayne Denham hadn't seen him in eight years, had not
14 spoken to him since Shelly Wayne Martin was 16. Eight years
15 later he says in a room full of people trying to figure out who
16 murdered the Wyche brothers, and they hear one thing loud and
17 clear on that tape, "Shit, Wayne", they all decide, oh, that must
18 be Wayne Martin's voice.

19 To his credit, when he actually took the stand, he
20 said, I can't be sure of that. He did back off of it. But that
21 is what the government's relying on in this case -- Dwayne
22 Denham's identification of his voice.

23 But you also heard the testimony of Detective Benson.
24 Detective Benson listened to the taped voice of Shelly Wayne
25 Martin. He's been in the courtroom and heard Shelly Wayne Martin

1 talk. He testified he's familiar with Shelly Wayne Martin's
2 voice. And you know he's listening, he's listened to that voice
3 mail numerous times. And he testified for you that he did not
4 hear Shelly Wayne Martin on that voice mail tape.

5 Darryl Bacon, long time friend of Shelly Wayne Martin.
6 Grew up with Shelly Wayne Martin. One of the government's key
7 witnesses in this case. Very familiar with Shelly Wayne Martin's
8 voice. The government played the tape for him. He also said, I
9 did not hear Wayne Martin on that tape whatsoever.

10 In regards to the Wyche murder, not only do they rely
11 on Shelly Wayne Martin, they say it's buttressed by the phone
12 calls, the phone traffic in this case. That Mr. Mitchell is
13 having conversations with Darryl Wyche and at the same time he's
14 also having these conversations with his group, his gang. He's
15 assembling his gang.

16 In spite of the fact that none of these calls are being
17 shown to be connected, Mr. Hanlon says, assures you, oh, they
18 were talking. Even though none of the phone calls connected, he
19 assures you they were talking. There's no such assurance that he
20 can give you.

21 Look at the phone records. The last call from Willie
22 Mitchell to Shelly Wayne Martin took place at 9:30, 9:30 that
23 night. They did not speak again that night. There's numerous
24 calls from Mr. Mitchell to Mr. Martin's phone. None of them are
25 connected. There is no proof whatsoever that they spoke at all

1 after 9:30 that night.

2 And in fact, Mr. Martin has only one contact that
3 night, was at 11:37 that night, when he takes one call from Shawn
4 Gardner while he probably is still in the movie theater. I
5 believe Mr. Hanlon misspoke and said that Mr. Martin called Mr.
6 Gardner from the movie theater. If you look at their own chart,
7 it reflects that, in fact, Mr. Gardner called Mr. Martin while he
8 was still in the movies.

9 Now, if you look at the other phone calls on that same
10 chart, it's all consistent with Wayne Martin being in the movies.
11 You see him right before 10:00 when the movie is to begin. You
12 see him do four quick calls in an attempt to get a hold of Mr.
13 Gardner. All four of those calls go to voice mail.

14 So obviously, he is trying to get a hold of Mr. Gardner
15 and that's probably why he does accept the one call from Mr.
16 Gardner while he's in the movies. But that's the only call
17 Shelly Wayne Martin has from 10:00 that night until noon the next
18 day. It's all consistent with what he told the detectives.

19 And what did he tell the detectives? He told them when
20 he was arrested that he, in fact, went to the movies with
21 Lakeisha McCoy; that he picked her up at her house. Her mother
22 babysitted, babysat her two young children. They went, picked up
23 some alcohol, sat out in the parking lot, drank their alcohol.
24 He went in and bought the tickets. They went in and watched
25 Blade Two, a 10:00 movie. Then they went back to his house,

1 spent the night. And he took her home around noon the next day.

2 That's exactly the story that Lakeisha McCoy provided
3 when they took the stand here today or during the trial. The
4 exact same story.

5 Now, I did spend a good bit of time going over this
6 chart with Detective Benson. Not so much that I cared about any
7 of the particular times of the calls, as some of the other
8 parties do, but it's just the manner in which that chart was
9 prepared. I sat down with all the phone records, as I'm sure
10 Detective Benson did, because in order to see whether or not a
11 call is connected, you really have to match up the two phones.
12 Detective Niedermeier obviously didn't do that. Detective
13 Niedermeier provided Detective Benson with information that he
14 had seven different lengthy phone calls between Mr. Mitchell and
15 Mr. Martin during this time in the movies. So Mr. Martin
16 couldn't have been in the movie.

17 Detective Benson did take the time to sit down and go
18 through all these records and discovered, when he made this
19 chart, that, in fact, none of these calls were connected. Yes,
20 Mr. Mitchell did place calls to Mr. Martin's phone but they all
21 went to voice mail. And if you'll note, as of 12:15 on that
22 night, you still see Mr. Mitchell trying to reach out to Shelly
23 Wayne Martin. He still has not gotten a hold of Mr. Martin as of
24 12:15 that night. And I'm sure you'll recall that the Wyche
25 brothers murders took place between 12:30 and 12:38. As of

1 12:15, Mr. Mitchell still has not gotten a hold of Shelly Martin.

2 Now, the government would say that this is all just a
3 fabricated alibi, anyhow, that you can ignore this. It's just a
4 fabrication. In order for this to be a fabrication, look at what
5 happened.

6 Shelly Wayne Martin went to a 10:00 movie. Mr.
7 Mitchell does not even call the Wyche brothers until, I believe
8 it's 10:45. 10:43. Which brings me, I might as well mention
9 this call to this phone number. That's the call that Detective
10 Benson put down as a connected call, two connected calls. If you
11 recall, those calls went to a phone of the Wyche brothers that
12 was forwarded to somewhere we don't know. We can't say where
13 that call went. But yet they include that on the list.

14 The purpose of that, I'm not sure, because they do talk
15 a minute later. One minute later, we do clearly have a connected
16 call. So why we have to include those two calls to this phone
17 that forwards them off into oblivion, I'm not sure. I would tend
18 to think it's the overreaching that's referred to, Mr. Martin
19 referred to earlier. The government overreached. There's no
20 reason to include those calls. But they're included. They talk
21 at 10:43.

22 Now, if Mr. Martin is just going about setting up a
23 paper trail alibi, he could do a better job than buying movies or
24 buying tickets to a 10:00 movie when Mr. Mitchell has not even
25 called the Wyche brothers yet. Has not even placed a call.

1 Now, Mr. Hanlon said, Well, there wasn't, there hadn't
2 been a lot of contact between the Wyche brothers and Mr. Mitchell
3 for some time. And that's correct. Go through the phone records
4 if you like. We had a chart of all the contacts between Willie
5 Mitchell and Mr. McCaffity. We had pages of them. You didn't
6 see that list of contacts between Mr. Mitchell and the Wyche
7 brothers because it wasn't there. There is no list. That 10:43
8 call is the first time that Willie Mitchell had spoke to the
9 Wyche brothers in weeks.

10 Go back through the records. I did. I'm sure
11 Detective Benson did. I'm sure he had them in his system. I'm
12 sure he would have printed out all the calls between Willie
13 Mitchell and the Wyche brothers if any occurred before that 10:43
14 call. That's the first time he had called him in weeks. That
15 isn't a very good paper trail that Mr. Martin is setting up if
16 he's trying to cover his bases. Mr. Mitchell is not even
17 reaching out to the Wyche brothers until 10:43.

18 When is this alleged deal between Mr. Mitchell and the
19 Wyche brothers set up? Well, we know that from Damita Green.
20 She testified that at 11:40 Mr. Mitchell receives -- I'm sorry --
21 Darryl Wyche receives a phone call. She hears him say, Bo, are
22 you still trying to get that? That's when this deal is set up,
23 at 11:40. 11:40 that night.

24 Mr. Mitchell does not speak with Wayne Martin any time
25 after that. Mr. Martin's phone does not speak to anyone after

1 that. Mr. Martin's phone does not contact anyone other than Mr.
2 Gardner at 11:37. This deal is set up at 11:40. And Mr.
3 Martin's phone is inactive after that. This is not a paper trail
4 alibi. Mr. Martin went to the movies with Lakeisha McCoy.

5 In its efforts to try and show a connection between Mr.
6 Martin and Darryl Wyche, we have Government's B-10, which shows
7 three contacts three weeks beforehand on this cell phone that
8 both of the Wyche brothers show as being Alvin's cell phone.
9 That's why I assure you if there's any contact between Darryl
10 Wyche and Willie Mitchell, we'd have a chart, because the
11 government is reaching so much they have to reach back three
12 weeks beforehand on a phone listed or in the Wyche brothers'
13 phone book, to Alvin Martin to show a connection between Mr.
14 Martin and the Wyche brothers.

15 And you'll see right there in that same chart that they
16 also ran Mr. Martin's phone, the one we know he used. And there
17 was no contacts whatsoever between Mr. Martin and the Wyche
18 brothers.

19 Mr. Hanlon spoke yesterday and said that Darryl Bacon
20 testified that Shelly Wayne Martin had purchased drugs or there
21 was a drug connection between Shelly Wayne Martin and Darryl
22 Wyche. Go through your notes. I sat down with my notes, went
23 through them all, talked to Mr. Crowe. Do you have that in your
24 notes? No such testimony. There was no such connection made.
25 There was never any testimony connecting Darryl Wyche and Shelly

1 Wayne Martin. Again, your notes are the ones that control. Your
2 memory's going to be the ones that control. The government never
3 made any such connection.

4 The government seemed to have a problem with Lakeisha
5 McCoy's testimony. How did she have such a good memory of the
6 events of that night? Didn't she feel pressured to remember
7 that, in fact, Mr. Martin used a credit card? Well, it's easy
8 enough to see how she remembered the events of that night. It
9 was her birthday. Would it be unusual for Mr. Martin to come
10 over and take her out to the movies on her birthday? Would she
11 be in a position to remember that particular event? I submit to
12 you I don't think it is unusual.

13 Mr. Hanlon had a problem with the fact that, you're
14 telling me there wasn't a birthday party? You're telling me they
15 went to a 10:00 movie and didn't see anyone that they knew?
16 Well, is it unusual for a mother with two young kids to go to a
17 10:00 movie on a Sunday night and fall asleep during the movie?
18 Is it that unusual for a couple to go out to a 10:00 movie on a
19 Sunday night and not run into anyone they know? I submit to you
20 that's not unusual whatsoever.

21 Actually, if they had run into someone they knew, I'm
22 sure Mr. Hanlon would say, Well, isn't that convenient? You go
23 to a 10:00 movie on a Sunday night and you just happen to run
24 into friends of yours. That's what attorneys do.

25 We try to take our facts. And he's just doing his job,

1 making it sound unusual. It's not unusual at all that you would
2 go to a 10:00 movie Sunday night, not run into anyone. That a
3 mother with two young kids goes to a late movie on Sunday night
4 and falls asleep. She's going to see Blade Two. I'm sure that
5 wasn't her choice. And for her to go in there and fall asleep
6 after a few minutes I don't find surprising whatsoever.

7 The important part of this, however, is not that she
8 saw any of the movie because, as the government points out, the
9 movie really does not cover the time of the murders. What is
10 important is she went back to Wayne Martin's house and spent the
11 rest of the night with him.

12 He was with her the whole time. She did not leave
13 until noon the next day. That's what her testimony was. That's
14 what Wayne Martin testified to. And that is the period of time
15 that's critical, because that's when the murders occurred.

16 The government also made much of the fact that Mr.
17 Martin came up with the ticket stub for this.

18 Now, if you will recall the way the events occurred in
19 this, Detective Niedermeier responded to the scene of the Wyche
20 brothers' murder and was at the scene most of the morning. Then
21 in that afternoon he responded to the Magginson house. Went
22 directly to the Magginson house, where he was given this voice
23 mail tape. And at that time, all the people over at the
24 Magginson house were identifying Wayne Martin as being implicated
25 in this because of the "Shit, Wayne."

1 So the very afternoon that they discover the Wyche
2 brothers' bodies, Wayne Martin is already being implicated in
3 this. And word on the street is going out that Wayne had
4 something to do with the Wyche brothers' killings. This is the
5 very afternoon.

6 The very next morning -- he had gone to the movies the
7 night before. The next day he's being implicated. Would it be
8 unusual for him to still have that ticket stub and realize that
9 he may have to hang on to that? We aren't talking weeks or
10 months down the road. He would have realized the next day that
11 this ticket stub was important and hung on to it and put it in a
12 place where his mother could recover it later.

13 Did he have to show any type of credit card receipt?
14 Detective Niedermeier went and recovered the records from the
15 movie theater. He did -- credit cards always leave a paper
16 trail. It wasn't important for Lakeisha McCoy to say that he
17 paid with a credit card. Detective Niedermeier was always going
18 to be able to recover those records.

19 Now, let's talk about what Detective Niedermeier could
20 have done in this case that would have been proof positive that
21 Shelly Wayne Martin was there or, more importantly, that Shelly
22 Wayne Martin was not there.

23 When did Detective Niedermeier go and investigate this
24 alibi of Shelly Wayne Martin? The murder occurred in March.
25 Shelly Wayne Martin was arrested April 17th. Detective

1 Niedermeier investigates his alibi in November. I guarantee you
2 what happened is that murder file ended up on the desk of some
3 city prosecutor. They read it and said, Detective Niedermeier,
4 this guy's got an alibi that you haven't even investigated.

5 MR. HARDING: Objection.

6 THE COURT: Overruled.

7 MR. PYNE: That's when Detective Niedermeier -- he had
8 long ago closed the case up. He hears "Shit, Wayne" on the tape.
9 Wayne is a friend of Willie Mitchell's. Willie Mitchell, we
10 know, was calling the Wyche brothers that night. Case closed.

11 In addition to that, Detective Niedermeier believes he
12 has seven lengthy conversations between Mr. Mitchell and Mr.
13 Martin. He thinks he's golden. So he doesn't even investigate
14 the alibi. But March and December of 2002, he finally responds
15 to the movie theater and then finds out, well, yeah, in fact,
16 Shelly Wayne Martin did buy two tickets to the 10:00 showing of
17 Blade Two and did use his credit card, and here's a copy of the
18 receipt.

19 He goes and takes a statement from Lakeisha McCoy, who
20 says, Yeah, I was at the movies with him. We went to see Blade
21 Two. I fell asleep, went back to his house that night, and spent
22 the night with him. He never left.

23 And then when Detective Niedermeier turns over all his
24 phone records to Detective Benson and Detective Benson finally
25 take the time to go through them and try to match them up, do

1 they realize, hey, we don't have seven lengthy conversations
2 between Mr. Mitchell and Mr. Martin. We've got a bunch of calls
3 going to voice mail.

4 I think what happens here is, when I was going through
5 the phone records with Detective Benson, I had a problem with how
6 he's matching them up. Now, Detective Benson is not an expert in
7 phone records. He'll tell you as much I'm sure. He sat down
8 with the one phone. And you got to match it up with the other
9 phone. And there's a time difference. And you'll recall me
10 asking him about that. I hated doing it because it's very
11 tedious stuff because you have to go through each phone call,
12 just like he told you. I had to do it. He had to do it. And
13 you've got a 23 second difference between the two phones here and
14 a 24 second difference there. And then you go to a 37 second
15 difference. That bothered me. Shouldn't it be a consistent
16 difference?

17 And then we get down to that one part where we go,
18 okay, this call has a 24 second difference, this one has a 26
19 second difference, all with the Wyche brother phone being behind.
20 And then we go to this call where it goes to a minute ahead. It
21 shouldn't go from consistently behind to a minute ahead.

22 I think Detective Benson made a mistake there. And I
23 think if he looked at his chart with a fresh outlook he would
24 probably agree and say, yeah, I shouldn't have included it. I
25 probably should change that from a connected call to voice mail.

1 But I think what happens is once you invest yourself into
2 something, once Detective Benson invests himself in this chart,
3 he feels an obligation to defend it.

4 And once Detective Niedermeier charged Wayne Martin,
5 we're done looking for other suspects. We're done looking for
6 any way that our case is bad. We don't want to even look at the
7 alibi. We're just going to buttress what we've already charged.

8 And I think that's what happened to Detective
9 Niedermeier. He convinced himself that that "Shit, Wayne" tied
10 Wayne Martin into this. And he, rather than investigating the
11 alibi, rather than looking for any other suspect, all he did was
12 try to buttress what he already thought he knew, that Wayne
13 Martin was involved. "Shit, Wayne" is not proof positive.

14 Willie Mitchell has been trying to get a hold of Wayne
15 Martin all night. Isn't it a better explanation that he used
16 another phone or someone used another phone that the detectives
17 haven't accounted for, tried again to get hold of Wayne? He is
18 still not taking the calls. The calls are still going to voice
19 mail. And so whoever's trying to call him says "Shit, Wayne."

20 I don't have to explain that "Shit, Wayne" on the tape.
21 Mr. Martin's not there. We know that because Darryl Bacon says
22 his voice isn't there, Detective Benson says his voice isn't
23 there, and it's up for the government to prove that he took place
24 in that murder, and they haven't done so.

25 Mr. Martin was not required to come up with an alibi.

1 Mr. Martin, he's sits there at the defense, as a defendant, does
2 not have to put on any defense whatsoever. But we did, through
3 both Detective Niedermeier and the testimony of Lakeisha McCoy,
4 present you with evidence of where Wayne Martin was that night.
5 He was clearly at this movie, Blade Two, 10:00 showing, with
6 Lakeisha McCoy, spent the rest of the night with her, and did not
7 participate in any way in this Wyche brothers shooting.

8 As I said, the Wyche brothers shooting involves three
9 of the acts, the overt acts contained in this indictment. The
10 rest all have to do with drug distribution. It's one of the
11 racketeering acts. It's also Count Eight in the conspiracy
12 counts.

13 So let me address the drug trafficking issues here.
14 And again, the enterprise and the conspiracy are both alleged as
15 one big umbrella. Over this period of time, 1994 through 2006,
16 this is the time period chosen by the government. If they proved
17 something different, if they proved smaller conspiracies,
18 multiple conspiracies, the correct verdict is not guilty because
19 they have not proven what they charged. They're the ones that
20 chose to present it this way, to charge it this way. And Mr.
21 Martin is relying upon you to hold them to that proof.

22 Let me just quickly go through the other counts Mr.
23 Martin's charged with. Count Five, again, murder of Darryl
24 Wyche. Count Six, murder of Anthony Wyche. Count Eight is the
25 big overarching drug conspiracy. Count 12, 13 and 14 are all

1 firearms counts dealing with the Wyche homicides. If you find
2 that Mr. Martin was not a participant in the Wyche brothers
3 homicides, however, then all these firearms counts drop out as
4 well.

5 MR. HARDING: Objection.

6 MR. PYNE: The judge will explain to you how to apply
7 the facts to the law and he'll do a much better job than I will.
8 But let me again go to the overall drug conspiracy.

9 Did the government prove a drug conspiracy going from
10 1994 through 2006? Mr. Hanlon, when he put on his charts, he had
11 a list of five witnesses that he felt proved this. Two of them I
12 don't think really apply to Mr. Martin. Natasha Wyche I don't
13 believe said anything about Mr. Martin. I think she said he was
14 present when she got some money from Mr. Gardner once, but other
15 than that really doesn't shed any light on Mr. Martin.

16 Dwayne Denham, his testimony was that he really didn't
17 know about Mr. Martin. He had heard some things but could not
18 testify from any personal knowledge about Shelly Wayne Martin and
19 his drug dealing or alleged drug dealing.

20 So what witnesses did we hear from? I submit there
21 were three and those were the three that I agree with Mr. Hanlon
22 on -- Ernest Reynolds, Darryl Bacon, and William Montgomery.

23 Ernest Reynolds, his testimony in drug dealing dealt
24 with the very beginning of this alleged conspiracy. He testified
25 that he met Wayne Martin because Wayne was the little brother of

1 his friend, Alvin Martin, and in fact, he brought him into his
2 unit, his organization, to cut heroin for him.

3 He also testified that later on, six months later or
4 so, Mr. Gardner also joined another individual in this unit to
5 cut heroin for him. Well, this is the beginning of the
6 government's enterprise. We have Shelly Wayne Martin cutting
7 heroin for one individual. We have Wayne Gardner allegedly
8 cutting heroin for another individual. No testimony about Willie
9 Mitchell at all. Mr. Harris isn't coming into the picture for
10 years. This is the start of our enterprise in 1994. This is our
11 continuous unit with a common purpose and an organization.
12 Shelly Wayne Martin cutting heroin for one individual, Wayne
13 Martin, Wayne Martin -- Shawn Gardner cutting for another.

14 This is a completely separate conspiracy. What we have
15 here are multiple, smaller conspiracies, not the one, big overall
16 conspiracy that the government would have you believe.

17 Again, Mr. Reynolds is a cooperator. He got benefits
18 for his testimony. You must ask yourself how that might have
19 affected his testimony. Did that color his testimony in any way,
20 the fact that he was, as Mr. Martin says, getting the coin of the
21 realm?

22 Take into your consideration the fact that while he's
23 cooperating he is arrested with 60 pounds of pot, to no apparent
24 ill affect, no affect on his agreement with the government that
25 we can tell at this point. He's clearly violated his plea

1 agreement but to what end, we're left to wonder. So that's the
2 testimony at the beginning of this overall enterprise.

3 Again, Mr. Martin, Mr. Gardner, working for two
4 different people, not part of the same organization other than
5 the overarching unit. They're in different locations. These are
6 separate, independent conspiracies. No Mr. Mitchell, no Mr.
7 Harris.

8 Let's go on to Darryl Bacon, another, again,
9 cooperator, receiving a benefit from the government. Still has
10 pending charges in court, in Anne Arundel County. That remains
11 to be seen what will happen with that.

12 Darryl Bacon was clearly friends with three of the
13 individuals, Gardner, Martin and Mitchell. It's unclear on their
14 time period. Going back in my notes, I'm unclear on the time
15 period, I should say, of when Darryl Bacon first started selling
16 drugs. But it's clear he started selling on Winters Lane. I
17 think your notes will show, once you refer to them, that he
18 started on Winters Lane.

19 He says at that time that his recollection was that
20 Shawn Gardner was dealing in the Savoy Apartments. He knew Wayne
21 had moved down to South Baltimore and thought he was dealing
22 drugs down there. That was his testimony. He thought he was
23 dealing drugs down there.

24 What do we have here? Different individuals, different
25 places, doing different things. No continuing unit, no common

1 purpose. Each one is just looking out for themselves. They just
2 happen to be friends from growing up.

3 Mr. Mitchell, during this period of time, again,
4 playing football up at community college. They do go up there
5 and visit him, go out to the night clubs in New York. But he
6 obviously is not taking part in any enterprise while he's up
7 there.

8 Again, Mr. Hanlon stated that there was testimony from
9 Mr. Bacon that Shawn Gardner and Mr. Martin were getting drugs
10 from Darryl Wyche. I don't believe there was any connection
11 between Darryl Wyche and either Mr. Martin or Mr. Gardner.

12 We do have Darryl Bacon going through several sources
13 of drugs. They take him through a whole list of the people that
14 are on their chart. He did testify that he never got drugs from
15 Wayne Martin. I do have that distinctly in my notes, underlined.
16 He never got drugs from Wayne Martin. He testified that he did
17 get drugs from an individual name Polo and he did say that Mr.
18 Martin and Mr. Gardner got them from Polo as well.

19 He did say that sometimes they would go together, but
20 there was no pooling of funds, no sharing of profits. These are
21 each individual contractors who just happened to be going to the
22 same source of supply.

23 He identified this individual named Poppi in New York
24 as well. And he said once or twice he did go to this individual
25 with Mr. Martin.

1 He identified an individual by the name of Card. His
2 testimony, also, was, and again, look in your notes, he did not
3 know if Mr. Martin ever went and got drugs from Card.

4 He identified Goose. He said that he bought drugs from
5 this individual named Goose. He also testified that he knew that
6 Mr. Martin did not get drugs from Goose. Again, that's another
7 line in my notes, underlined. Mr. Martin did not get drugs from
8 Goose.

9 Bacon in 1998 said, consistent with the government
10 theory that he then moved up and started selling weight, larger
11 amounts of drugs, again, in my notes, underlined, testified that
12 he did not know what Martin was doing at that time. Could not
13 say that Mr. Martin was dealing weight. Could not testify about
14 what his drug dealing was at that time.

15 How can we have an enterprise here involving Mr. Bacon,
16 involving Mr. Gardner, involving Mr. Martin, when Mr. Bacon
17 doesn't even know what Mr. Martin is doing during this period of
18 time?

19 1999, in June of 1999 we know Mr. Martin's drug dealing
20 ceases because he's arrested on a firearms charge. So from June
21 on, I believe there's no further testimony of any involvement
22 whatsoever with Mr. Martin and drugs. From 1999 on, no testimony
23 whatsoever about Mr. Martin involving drugs. Again, that's my
24 recollection. Go with yours. But this alleged enterprise is
25 supposed to go on through 2006.

1 2000 to 2003, Mr. Bacon himself is in jail. Mr. Bacon
2 testified that he carried a gun for protection, but he also
3 testified that he knew Mr. Martin did not own a gun and did not
4 carry a gun.

5 Mr. Bacon testified that he cooked crack at the
6 Winchester Apartments. He said that Mr. Martin never messed with
7 crack. Now, these last few points are important because they're
8 in direct conflict to the testimony of the other big cooperator,
9 William Montgomery.

10 Mr. Bacon says Mr. Martin never carried a gun. Mr.
11 Montgomery says he did carry a gun. Mr. Bacon says Mr. Martin
12 did not cook crack, did not mess with crack. Mr. Montgomery said
13 he did sell crack. You can't believe them both. And these are
14 the two big cooperators that the government is depending upon.
15 And they're in direct contradiction of each other on these
16 important points in this drug trafficking count.

17 Now, the government's asking you to believe Mr. Bacon
18 and his testimony, but they have not brought up the fact that Mr.
19 Bacon also testified that he spoke to Shawn Gardner about the
20 stop involving Mr. Martin and Mr. Gardner on 95. And Mr. Gardner
21 told him that Wayne Martin did not know that there was crack
22 cocaine hidden in the car that he was stopped in and that is why
23 he consented to the search of the vehicle. Again, go back and
24 look at your notes. I have that in my testimony.

25 If the government is going to ask you to believe Mr.

1 Bacon, they have to have you believe everything he's testifying
2 to. And he testified Mr. Martin did not even know that that
3 crack was in the car. If you recall, the testimony was Mr.
4 Gardner had just purchased that car. The crack was secreted
5 underneath the center console. And Mr. Martin consented to a
6 search of the car.

7 Let me next go to William Montgomery. Again, another
8 cooperator being given the coin of the realm, as Mr. Martin would
9 put it. Again, an individual who grew up with Wayne, Mr.
10 Gardner, Mr. Mitchell, from a young age. He also said he started
11 off dealing drugs in Winters Lane, same thing as Mr. Bacon. I
12 believe his testimony was he was initially supplied by Mr.
13 Gardner.

14 He again testifies to a couple of trips to New York
15 City. Another discrepancy. He says that they went for cocaine
16 and weed. I believe Mr. Bacon's testimony was that they went up
17 there for heroin.

18 Mr. Montgomery testified that others would pool their
19 money but he never did. Again, all this testimony is about Mr.
20 Gardner, Mr. Martin, and sometimes includes Mr. Bacon. No
21 mention of Mr. Mitchell. No mention of Mr. Harris in any of
22 this. Smaller conspiracy, different in time, different in
23 location. The government has not proven the big, overall
24 conspiracy here.

25 Mr. Montgomery testified that the trips to New York

1 went through 2000. As we just covered, Mr. Martin and Mr.
2 Gardner were both locked up in mid 1999. So I don't know who
3 he's making these trips with.

4 Mr. Montgomery testified about robberies. He said that
5 Mr. Gardner and Mr. Bacon often told stories about robberies.
6 And I think he related some of the stories. Mr. Martin's not
7 involved in any of these stories. The one story he's involved
8 in, remaining in the car while others jump out. But there's no
9 stories even being told about Mr. Martin committing any
10 robberies.

11 Mr. Martin was incarcerated from June of 1999 through
12 late 2001. Mr. Montgomery's locked up during 2000 to 2001 as
13 well. So in 2000, we have Mr. Bacon, Mr. Montgomery, Mr.
14 Gardner, Mr. Martin all incarcerated. These are all the core
15 group of what the government is saying is this enterprise.
16 They're all incarcerated. The only one on the street during that
17 period of time is Mr. Mitchell. This 2000 year is the year time
18 which he is arrested up in Pennsylvania.

19 Now, Mr. Hanlon said the fact of Mr. Gardner at one
20 point was dealing in Pennsylvania and -- I lost my train of
21 thought -- and Mr. Mitchell was dealing in Pennsylvania proves
22 that this is a conspiracy because they were both dealing drugs in
23 the State of Pennsylvania. Pennsylvania's a big state. Two
24 people dealing drugs in a state that big is not proof of
25 anything.

1 I think it was common knowledge, I think Detective
2 Ellington testified, you know when you go to a smaller town you
3 can make more money. Everybody knows that. These were just
4 smaller towns that these independent contractors chose to peddle
5 their drugs at, if you believe the government's evidence.

6 Now, the government has put a great deal of weight on
7 the testimony, or Mr. Montgomery's testimony about this family.
8 One thing I submit to you, that Terry Cheeks probably viewed
9 himself as a part of Mr. Montgomery's family up until the point
10 Mr. Montgomery put a bullet in the back of his head. But the
11 testimony about the family that he considered Mr. Martin and Mr.
12 Gardner part of the family stops just short of his whole
13 testimony.

14 If you'll recall on cross examination, he specifically
15 said, Mr. Mitchell wasn't a part of my family. That right there
16 is all the proof you need for multiple conspiracies here. Okay.
17 Mr. Montgomery, he's buying the fact that, okay, Mr. Martin and
18 Mr. Gardner are a part of his family. But Mr. Mitchell is not
19 part of this family. Multiple conspiracies, ladies and
20 gentlemen.

21 These are separate, distinct conspiracies. Every one
22 in here has their own interest. Mr. Montgomery, not only was he
23 friendly with Mr. Martin and Mr. Gardner, he was also part of the
24 Cruddy Crew. He is also part of the Out That Mob. Different
25 conspiracies with different people. He associated with whoever

1 he wanted to when it was appropriate to him.

2 Aaron Holly. Indications that he was a Blood. He had
3 a red hanky on him. And I think it was Ellington testified that
4 was an indication to him that Aaron Holly was a Blood. I don't
5 know whether he was a Blood or not, and I would submit to you
6 that that's sufficient proof to prove that he was a Blood. Just
7 evidence that there's multiple connections going on here.

8 Now, we have this robbery of Goose that is brought up
9 repeatedly. As far as I can tell, the robbery for Goose, the
10 only planning that went into this was Mr. Montgomery stumbles
11 upon Wayne Martin, who's hung over in his car at a gas station.
12 And they have a conversation. And during the conversation Mr.
13 Martin says something about robbing Goose. As far as I can tell,
14 that's the extent of it. There's no other evidence about this
15 robbery.

16 Mr. Montgomery does say something later on about being
17 hidden from Goose because he didn't want to be seen with Mr.
18 Gardner. But if you go back in your notes, I had in my notes,
19 Mr. Montgomery specifically testified he never discussed the
20 Goose robbery with Mr. Gardner. Never discussed the Goose
21 robbery with Mr. Gardner. I took that directly from my notes.

22 As far as I can tell, the only evidence is, as I said,
23 a hung over Wayne Martin having a conversation with Mr.
24 Montgomery in a gas station. At that time, Mr. Montgomery said
25 that Wayne Martin was in the halfway house still. We know he got

1 out of the halfway house on March 7th and he's not locked up
2 until April 17th. There's no other plan. They aren't scouting
3 out Mr. Goose. They aren't following him around. There's no
4 other testimony of any other activity whatsoever. This one
5 conversation is the only thing you're asked to act upon to prove
6 that this alleged conspiracy ever existed.

7 No explanation for why it didn't happen other than,
8 well, that was Wayne's thing. Well, Mr. Montgomery admitted that
9 he had information of where Goose could be found but he didn't
10 want to act on it because it was Wayne's thing. Again, no
11 corroboration whatsoever other than William Montgomery's
12 testimony. And Mr. Montgomery just can't be believed.

13 Mr. Martin is not implicated in any other robberies.
14 He's not implicated in the planning or any type of actions taken
15 in terms of the preparation for the Spence robbery. Mr.
16 Montgomery also makes a statement about Wayne having a gun with
17 three bodies on it. Now, I think the government has basically
18 abandoned that. I think they were throwing that out so you would
19 think that, well, if you take one of the Lee shootings with the
20 Wyche brothers, that could be a gun with three bodies on it.

21 But then Mr. Hayes said, well, he ended up with the
22 Wyche brothers' gun because he was given it by Mr. Mitchell right
23 after the Wyche brothers shooting. So they didn't need to pursue
24 that any more. And in fact, they didn't even mention it in their
25 closing.

1 I think what happened there was, during the slew of
2 proffer sessions that Mr. Montgomery gives, he realizes that,
3 hey, they basically allowed for him the ballistics of the
4 different murders. And he realizes, Oh, well, the same gun is
5 involved in three different murders. Hey, you know, I remember
6 Wayne saying something about somebody having a gun with three
7 bodies on it. Mr. Montgomery's not stupid. Eight or nine
8 proffer sessions into it, he'll come up with the testimony that
9 they're looking for.

10 The government again wants you to believe some of what
11 Mr. Montgomery is saying, but not other things. Mr. Montgomery
12 testified that Gardner told him that Martin never should have
13 been locked up because the statement on the voice mail was the
14 word "man" and not the word "Wayne." He testified to that.

15 Gardner told him, we've heard all about what Mr.
16 Gardner's telling Mr. Montgomery. And the government wants to
17 you to rely on what Mr. Montgomery was told on many of the cases,
18 but not that case, where he says, Wayne should have never been
19 locked up because they aren't saying Wayne. It just sounds like
20 Wayne. In fact, they were saying "man."

21 Montgomery testified that Gardner told him he needed
22 money to pay Wayne's lawyer. Well, earlier, before he knew that
23 it was important for him to tie the Gardner shooting to Mr.
24 Martin, he had said that Mr. Gardner had taken a fall for a
25 couple thousand dollars and was looking for money. By the time

1 he figured out that this connection was important, he came up
2 with the testimony.

3 I'm not even so sure that Mr. Gardner wouldn't have
4 said that. But ask yourself, was it true? If Mr. Gardner gets
5 locked up for the Spence brothers shootings, runs into Wayne in
6 jail, or someone else who's a friend of Wayne's, wouldn't it make
7 sense to say, hey, the only reason I did that shooting, or the
8 only reason I was involved in that robbery, I was just trying to
9 get money for you. Is that a bit self-serving? Is it actually
10 true that that was the reason that he did it?

11 Ask yourself what motivation Mr. Montgomery has. He
12 has a cap of 40 years on his sentence. There's no bottom to his
13 sentence, just a cap.

14 The Pennsylvania drug dealings I've already gone into
15 in some degree. There's no connection with anyone but Mr.
16 Mitchell. Mr. Martin's incarcerated. Mr. Gardner's
17 incarcerated. And no one else is involved in that but Mr.
18 Mitchell. Clearly, separate conspiracy, multiple conspiracy,
19 different location, different time.

20 The government has not shown the one overarching
21 conspiracy going from 1994 through 2006 that they need to prove
22 in this case. Shakedown Entertainment, there's no connection
23 between Mr. Martin and Shakedown Entertainment.

24 Mr. Harris does sing about Mr. Martin being locked up,
25 Weaze being in lockdown with Bo. There's no doubt about that,

1 they were locked up together. But there's no indication, no
2 evidence whatsoever that Mr. Harris even knows Mr. Martin.

3 In regards to the flesh and blood, as I'm referring to
4 it, papers that were filed, these individuals have been locked up
5 since 2002. At some point, do they get frustrated with the
6 system and start buying into a phenomena that's going on around
7 the courthouse? Sure, they do. They've sat here for eight weeks
8 just like you have, though, behaving themselves in court. This
9 is something that can be explained as just frustration with the
10 system.

11 But ladies and gentlemen of the jury, Mr. Martin was
12 not connected with the Wyche brothers murder. Any drug dealing
13 that might have been shown by the government was not part of this
14 big, overall drug conspiracy.

15 I would ask you to consider all the evidence put forth
16 in regards to the drug dealing. I think what it shows is
17 different, smaller drug conspiracies that did not involve all the
18 individuals, separated by time, separated by location, separated
19 by drugs.

20 This is a case that has been charged as a big
21 conspiracy by the government. They have not proven that
22 conspiracy. And I would ask you to find that they have not
23 proven this conspiracy and find Mr. Martin not guilty. Thank you
24 very much for your time.

25 THE COURT: Thank you, Mr. Pyne.

1 Ladies and gentlemen, we'll break for lunch. I'd ask
2 you, it's approximately ten of one. I'm going to ask you to be
3 back in the jury room at 1:45 to resume the proceedings this
4 afternoon.

5 Please leave your note pads on your chairs. Have no
6 discussion about the evidence or the arguments. Continue to keep
7 an open mind about all issues. Jury's excused until 1:45.

8 (Jury exits the courtroom.)

9 THE COURT: We're in recess until 1:45.

10 (Luncheon Recess.)

11 THE COURT: Mr. Flannery.

12 MR. FLANNERY: If you remember last night, I pointed
13 out to you that I think the problem with regard to the verdict
14 form, regarding 12, possession of firearm, and I think there
15 was --

16 THE COURT: I thought I fixed it.

17 MR. FLANNERY: I don't think you did, Your Honor.
18 Unless I'm mistaken. If I am, I apologize.

19 THE COURT: Now, you cited to Page 116, 117.

20 MR. FLANNERY: Now it's 118, Your Honor. 117, 118.

21 THE COURT: Possession of firearm. What's wrong with
22 it?

23 MR. FLANNERY: On Page 118, Number Two, Number Three, I
24 believe both those should indicate Count 12, whereas Mr. Harris's
25 indicates Count 10 and Mr. Martin's indicates Count Nine. And

1 where Mitchell and Gardner, it's Counts 12. They should all be
2 Count 12.

3 THE COURT: I don't think so. Count 12.

4 MR. FLANNERY: Because on the preceding page, on the
5 top of 117, it already deals with Shelton Harris in Count 10 of
6 the indictment. Count 12 is all the defendants. I believe
7 that's in relation to the Wyche.

8 THE COURT: Right. Right. Murders of the Wyche is
9 Count 12.

10 MR. FLANNERY: Should all be Count 12.

11 THE COURT: I see what you're saying. In other
12 words --

13 MR. FLANNERY: It's really just a typo.

14 THE COURT: I see what you're saying. I missed this.
15 So Paragraph 2 should say 12 and Paragraph 3 should say 12.

16 MR. FLANNERY: Yes, sir.

17 THE COURT: Sure. Okay. All right. Thank you. Thank
18 you, Mr. Flannery. I misunderstood.

19 MR. HARDING: Judge, I put that in the draft so Mr.
20 Flannery could read this carefully.

21 MR. FLANNERY: I got him once again, Your Honor.

22 THE COURT: Okay. So I'll correct that on the verdict
23 sheet and just alert it.

24 Counsel, what I propose to do. Of course, I have no
25 idea whether, whether I'm going to be able to instruct today or

1 not. I very much want to. And what I propose to do, because I
2 understand there's no agreement on transcripts, correct?

3 MR. HARDING: Correct.

4 THE COURT: So I'm going to have, simply have the jury
5 remove the transcripts from their, from the loose leafs that the
6 government gave them and insert the instructions and have them
7 read along with me.

8 So the government should be prepared to collect the
9 transcripts. Okay? We'll have the jury, please.

10 (Jury enters the courtroom.)

11 THE COURT: Good afternoon, ladies and gentlemen. We
12 will get your notebooks to you in just a moment.

13 All right. Whenever you're ready, Mr. Kurland.

14 MR. KURLAND: Thank you, Your Honor. Good afternoon,
15 members of the jury. Let me just take this time to reintroduce
16 myself. I'm Adam Kurland. And myself, along with my co-counsel,
17 Barry Coburn, and our client, Shawn Gardner, we want to thank you
18 just deeply and incredibly for your incredible service in this
19 case.

20 Jury service is, I think, one of the most important
21 aspects, if not the most important civic obligation, that we
22 have. And it's also one way to kind of connect, you know, to the
23 community and to our government in a way that's different than it
24 was a generation ago. My father and his, and my uncles, they
25 served in World War II and there was the common experience of the

1 military. We don't have that now.

2 And there are just a few ways we can really connect
3 with the federal government. I suppose the post man is one way.
4 But even with Fed Ex and with e-mail like that, we don't really
5 get that much mail any more.

6 But this jury service is incredibly important. And the
7 solemn oath that you take is just an incredible aspect of the
8 system. And to be part of the system is really to experience in
9 a way that is very difficult to describe the majestic chaos that
10 has been this criminal trial. And I say majestic chaos because
11 while things don't always go orderly, it's hard to start on time
12 every day for a variety of reasons, ultimately we churn through
13 this process to arrive at this point, which is closing argument.

14 Now, obviously, you knew that. But I want to emphasize
15 a couple of things.

16 This will be our opportunity or my opportunity, and my
17 only opportunity to discuss the evidence with you and respond to
18 the government's arguments. The government, on the other hand,
19 has already gone once for three hours and they'll get to go
20 again. They'll get their rebuttal. And the reason for that is
21 that the government has the burden of proof beyond a reasonable
22 doubt, which is a substantial burden and it's an important
23 burden. And those words obviously mean something. And that will
24 be for you to determine whether the evidence has established
25 guilt beyond a reasonable doubt.

1 But because that is such a high standard, the rules as
2 the trial is set forth are set forth in such a way that the
3 government has that very substantial additional opportunity to
4 address you. So it's not like it's a fair balance and it's equal
5 and so on and so forth. But again, it's because and only because
6 the government has the burden of proof beyond a reasonable doubt
7 that they get that second opportunity to address you, whereas for
8 us this is our only opportunity to discuss the evidence with you
9 and to counter the government's arguments, at least the arguments
10 that were set forth in their initial closing argument.

11 Now, at the very beginning of the trial, Coburn used
12 this toy to illustrate the point as to what we thought that the
13 evidence would show. And in a very kind of basic way, but
14 logical way as well, because anybody who has kids knows that the
15 ability to put this in the right square is sort of the beginning
16 of cognition and a rational understanding and evaluation of the
17 evidence.

18 And Mr. Coburn said that the government's case, to a
19 large extent, will be to try to fit the proverbial square peg
20 into the round hole, and it doesn't fit. Now, that was at the
21 beginning of the trial when all the parties set forth their
22 version of what they thought the evidence would prove or what
23 they thought that it might prove.

24 At closing argument, now we've all heard the evidence
25 for it seems like forever, but we've heard the evidence for a

1 long time and now it's our opportunity to marshal that evidence,
2 to make the arguments as to what has been established, whether
3 the burden has been established and so on and so forth.

4 Now, I still think, and I submit to you that this still
5 applies, that with respect to the, particularly the RICO
6 conspiracy, the government's efforts in this case, and it's been
7 elaborated on by some of the other defense counsel, is still
8 falling short, that it's the square peg of the evidence to try to
9 fit it into the round hole of the alleged enterprise, and they
10 have to do that beyond a reasonable doubt.

11 But let's be honest. You know, this is not a script.
12 And things happen a little bit differently. And there's no way
13 that any of us could have anticipated exactly how all the
14 evidence was going to come in. I mean, this isn't Law and Order
15 drama. This is a real trial and the evidence, through cross
16 examination, no one can really tell until all the evidence is in
17 the shape of things.

18 If I had more three dimensional geometric objects,
19 trapezoids, parallelograms, whatever, I would take those, too.
20 Those are a little bit more complex. But I would also illustrate
21 or try to illustrate the point that even the more complex
22 geometric shapes don't fit into the round hole of the
23 government's case because things have changed but the general
24 point is, it isn't just the square peg that doesn't go into the
25 round hole, it's any other kind of large, multi-dimensional,

1 geometric shape that you want to use as a metaphor.

2 On the other hand, the government began this case in
3 their opening statement. Mr. Harding said that this was going to
4 be a descent into inferno. And Mr. Hanlon repeated those
5 identical words in his closing argument. A descent into inferno.
6 Let's think about that. That can mean only one thing. They are
7 literally and figuratively trying to inflame you with that
8 language. That's the inferno. There's no fire here. There's no
9 arson here. In fact, I would venture to say, with respect to
10 nine or ten weeks of testimony, that might well be the only
11 alleged crime that hasn't been established even by a scintilla of
12 the evidence.

13 There is no inferno based on the evidence. What are
14 they asking you to do? Descent into inferno. That's what they
15 said at the beginning. That's what they said a couple days ago.

16 Well, let's be honest about it. They are trying to
17 inflame you, to arouse your passions, to get your blood to boil,
18 to basically say by the verdict that you will return that you
19 feel that these four defendants individually and collectively
20 should go to down under, and I don't mean Australia. There is no
21 other way to interpret what they have said.

22 And why do they do that? Well, it's legitimate
23 rhetoric. I'm not saying it's an improper thing to do. But with
24 respect to what they're trying to do, with respect to inflaming
25 you to deal with the horrible evidence in this case, to not use

1 the reason of the law to come to a rational decision and to
2 evaluate the evidence beyond a reasonable doubt.

3 Now, there are different ways that some of the
4 different defense counsel have said that. And by the way, I go
5 last. There's some advantages to going last. Believe me, not
6 having lunch, I was very happy about that, that they took a lunch
7 break, not because I ate some great lunch to relax. You can
8 probably tell, I would have just as soon have gone at 9:30 this
9 morning. But it's obviously better to be speaking to the jurors,
10 you guys now, than if we had to go through the lunch hour.

11 But so, but the reason I bring that up is my time here
12 going last has some advantages to it because I've been able to
13 hear everything and at least digest figuratively, if not literal
14 food. I've heard what everybody else has had to say. It's not
15 choreographed in any way. I hadn't heard any of those arguments
16 before. I'm going to argue as well. So I'm going to try not to
17 repeat myself.

18 But it's sort of inherent in at least some of the
19 charges when all the defendants are together. So bear with me if
20 I seem to be repeating some of the things that have been said
21 before. I'm going to try to alter it so that doesn't happen.

22 In any event, what is necessary here is a cold,
23 critical evaluation of the evidence to see if the government has
24 proved their indictment, all of the charges, one by one, whether
25 they have proved with respect to each charge every element beyond

1 a reasonable doubt. Now, this is going to age me more than my
2 gray hair that I like to call silver, and that is there was an
3 old TV show that doesn't even show up on TV Land any more called
4 Judd for the Defense. It was in the early '60s and I was a
5 little kid at the time. And it was the first time when I watched
6 that show, it was one of that first wave of realistic lawyer TV
7 shows, when either the good guy prosecutor didn't win all the
8 time or the good guy defense lawyer, like Perry Mason, when they
9 had some, you know, bumbling, stumbling kind of DA type, didn't
10 lose all the time.

11 It was the first realistic show. And there was a line
12 in that show that has stuck with me all the years. And that is
13 the line that guilt is a matter of law, innocence is a matter of
14 conscience. We are here to determine guilt or not guilty. And
15 whether or not that determination is made depends on whether the
16 government has proved their case beyond a reasonable doubt.

17 Now, all this talk of descent into inferno
18 notwithstanding, when you get your verdict forms, the verdict
19 form, and there's about 18 or 19 pages because there are a lot of
20 counts, multiple defendants, and then there's some other, also,
21 special interrogatories and so on, so forth. But the verdict
22 form isn't going to say whether somebody should go to heaven or
23 hell, isn't going to say if somebody's a good guy or bad guy.
24 With all due respect to the Court here, those determinations are
25 made in a different courthouse on a different floor. Those

1 aren't made here.

2 Our determination is to establish, or your
3 determination is to evaluate the evidence to see if the
4 government has proved guilt beyond a reasonable doubt. That's
5 what you're going to be asked to do on the verdict forms. And
6 that is going to require a cold, not necessarily cold-cold, but a
7 rational analysis of the evidence and every element of the
8 offense. All right?

9 Guilty or not guilty. You're not being asked to
10 determine's anyone's innocence in any sort of moral,
11 philosophical or even legal sense. It's guilty or not guilty.
12 And if the evidence does not establish guilt beyond a reasonable
13 doubt, and Mr. Lawlor again indicated, we can't really define it
14 any more than it's the highest standard that the law provides.
15 Higher than what it takes to take away your parental rights.

16 That is what is being asked and that requires a
17 difficult -- the judge is going to instruct you, I think, on
18 instructions that are over a hundred pages long. That's what we
19 have to look forward to after the government's rebuttal, a lot of
20 listening to a lot of very important instructions. And that
21 obviously needs to be taken seriously.

22 Going back to that majestic chaos of our system. It's
23 majestic because the state, whether it's the state government or
24 the federal government, our government, with all the police
25 powers, can't just issue a decree and say you're guilty. Now,

1 that system does exist, unfortunately, in some parts of the
2 world, but not here. And that's why it's, it truly is majestic,
3 the process that we go through this. And it matters and it
4 matters deeply, and those words mean something. Guilt beyond a
5 reasonable doubt.

6 So the indictment is not evidence. The judge has
7 already instructed you on that at the beginning of the trial.
8 And I believe it's again going to show up in one of the
9 introductory instructions as well.

10 I'd like to say it's really a piece of paper, 20, 27
11 pages or so. It's more. It's an accusation. That's all it is.
12 All right? And again, in our system the government just simply
13 can't say you're guilty.

14 The government has spent a lot of time fiddling with
15 this. This is, as it came out in the trial, the fourth
16 superseding indictment. So they've gone through many, many
17 versions of this to try to tinker around, to present to you
18 through the grand jury -- and we heard a lot of talk in this
19 trial, a lot of evidence in this trial about grand jury
20 procedures. I'm going to talk a little bit about that as I go
21 through some of the witnesses.

22 But again, the government has put forth this document,
23 these charges, and it is their responsibility to prove these
24 charges beyond a reasonable doubt.

25 Now, I'm going to break the argument down this way.

1 The conspiracy and connection evidence, which will get us into a
2 discussion of some of the particular, some of the particular
3 witnesses. And then we'll talk a little bit about some of the,
4 some of the specific charges with respect to the murders and the
5 homicides, and a variety of other things.

6 At some point I'm probably going to make some reference
7 to some jury instructions which I expect the Court will give you.
8 Again, I'm certainly not going to come close or what I want to
9 identify a hundred or so pages. There might be three or four
10 that I make reference to with respect to instructions that I
11 expect the Court will instruct you on. I know the Court wants to
12 do it later this afternoon, either later this afternoon or
13 sometime very shortly. So we'll deal with that.

14 In addition, we'll also spend some time going through
15 some of the points and what I will contend will be just gross
16 misstatements that were presented in Mr. Hanlon's slide
17 presentation. Now, again, I'm very low tech. I mean, this is
18 about as low tech as you can get. And I've had a couple of
19 things. But bear with me as I try to organize that.

20 Now, the first thing that I'd like to do is put up a
21 diagram of -- I hope it fits. Yeah. I hope everybody in the
22 jury can see. This is a diagram of the five boroughs of New
23 York. Can't see? Okay. Well, I'll hold up and parade it around
24 like I'm in, in the fourth round at, in the middle of a prize
25 fight. Okay. All right.

1 Now, we heard a little testimony that New York. But
2 that's not why I'm showing that. I think we all know that's the
3 five boroughs of New York, all shown in different colors. Now,
4 that's real land. That's terra firma. Just like in this case.
5 Whether you want to say that's, you know, analogize that to the
6 five murders or a couple of the defendants or really, real things
7 that happened, that's firm land.

8 There's a lot of stuff in this case, by the way, that's
9 been proved. I'll talk a little bit about that and we'll get
10 back to that in minute.

11 But now I'm going to show you another map of New York.
12 Show it to the Court. I don't know if the Court wants to see it
13 as well. Now, this map of New York has the same ground, has the
14 same five boroughs. Baseball fans, we all know the borough of
15 Brooklyn used to be a separate city. That's why the Brooklyn
16 Dodgers were their own team. That's why they originally had a
17 team, because they were a separate city. But that's New York
18 history. Doesn't have anything to do with this case.

19 What this represents, though, is it's the same terra
20 firma but we have connection pictured on here. We have bridges
21 and roads. Now, what does that have to do with this case? What
22 makes the government's charges, or so they would want you to
23 believe, is the connection evidence. The evidence that connects
24 the defendants, the evidence that connects the murders, the
25 evidence that supposedly connects 12 years of drug dealing from

1 1994 to 2006. And it isn't just drug dealing, which also
2 connects everything, including the filing of pro se pleadings as
3 recently as a couple of years ago.

4 Now, it's the connection. And we can see that even
5 though it seems similar in some respects, these are very
6 different pictures.

7 I submit to you that the connection evidence which the
8 government needs to establish in this case is all supplied by
9 conscious less sociopaths who have no regard for the truth. Now,
10 that's fairly basic. But even to the point of being able to
11 prove these connections beyond a reasonable doubt?

12 Now, these bridges really exist. They're mortar.
13 They're concrete. They're tangible. And they have structural,
14 structural integrity that if you wanted to drive your vehicle
15 over with your family, you'd have the confidence to do it. I
16 submit to you that the connection evidence in this case has no
17 structural integrity, and you wouldn't, if these were the guys
18 that built it, the cooperators -- an interesting word that I'll
19 talk about in a minute -- you wouldn't drive your car across it.
20 You would not be convinced beyond a reasonable doubt that it's
21 genuine. It would be a mirage. We'll talk about that as we, we
22 get stuff together.

23 Now, the connection evidence sort of falls within four
24 general categories. Some gun evidence that I'll talk about, some
25 phone calls. This concept of paying for each other's lawyers.

1 And family and beefs. That's what I want to put up on the board
2 because Mr. Hanlon said that Mr. Montgomery isn't smart enough, I
3 think he even said, I have it in my notes somewhere, that he's
4 not a Ph.D. in racketology. Maybe that's, that's the Final Four.
5 He's not a Ph.D. in racketeering, that was it, to be able to
6 figure out how important it was to know that, well, the fact if
7 he's paying money for lawyers, that was important.

8 Well, the problem with that is, is that all these guys
9 really need to know is family and beefs. Now, we know we heard
10 that dozens of times during the trial. We heard it dozens of
11 times, frankly, in Mr. Hanlon's argument yesterday.

12 So it doesn't take to be a Ph.D. in racketeering, even
13 in a facetious way, for these guys to figure out not only the
14 coin of the realm, that's sort of like the term of day, but that,
15 look, all of these guys want to avoid federal prosecution. I'm
16 talking about the cooperators. And by the way, when we talk
17 about cooperators, let's think about that.

18 That really is a word. I actually looked it up in the
19 dictionary. It really is a word. But who uses that word? I
20 mean, I've got three kids. Okay. When they were little and they
21 were good, when I thank them for their cooperation on the rare
22 times that they cooperated, I never went around, when somebody
23 would say, well, how are your kids? Well, they're good
24 cooperators. No one, I submit to you, no one ever uses that term
25 except the government in cases like this because, and it's

1 understandable, because we don't want to call them anything
2 pejorative, that's cool, even though we could. But we want, but
3 it's an awkward concept because, what are they? I mean, they're
4 certainly not like any other normal civilian witness. That's why
5 they're called this awkward term and that's why the Court is
6 going to give you an instruction that amplifies the extra care
7 you have to take in evaluating their testimony.

8 And the question with respect to all of them, and in
9 particular with respect to the witnesses that matter with respect
10 to Mr. Gardner, I'm generally going to focus on Montgomery, I'm
11 going to try not to repeat a lot of the stuff that's already been
12 said about Montgomery, Mr. Reynolds and Mr. Bacon, and also Mr.
13 Hayes and Mr. Dobropolski actually have something to do with some
14 of the, these issues as well. But these are the general
15 cooperators that we're going to talk about.

16 Now, they're all admitted liars. Okay. So this isn't
17 about, this isn't about, do they ever lie? The question is, do
18 they ever tell the truth? Now, certain things, and let's just
19 admit this right up front. I'm going to jumble around, and
20 again, the best laid plans. I've already deviated a little bit
21 from my notes here. But I think that's okay.

22 Mr. Gardner was involved in drugs in the 1994 to 1999
23 period, give or take. I mean, he was arrested on I-95 with
24 drugs, which he admitted to, and which he also, as part of the
25 interview, fully cooperated and mentioned Poppi, a real person,

1 who shows up in a minute on the government's chart as one of the
2 suppliers. So no question about it.

3 Mr. Gardner, and he was convicted of that in state
4 court. We had testimony from that. Bacon talked about it. And
5 I believe some of the police officers talked about it. So with
6 respect to Mr. Gardner's drug activity from 1994 to 1999, he did
7 it. He did some of it, at least.

8 That little snippet of what Montgomery says, whether
9 it's true, we don't really need to solely believe him because we
10 have law enforcement people coming in, testifying that the stuff
11 was in the car. He admitted to it. So fine, Mr. Gardner, you
12 know, did drug activity in 1994 to '99. And then he is convicted
13 and he spends a couple of years in state prison.

14 Okay? Now, by the way, we'll talk a little bit about
15 the dual sovereignty instruction as well. But putting aside the
16 statute of limitations issue that need not concern you, okay,
17 now, he was charged state, I guess he can be charged federally
18 for that perhaps. But that isn't this indictment.

19 The Count Eight conspiracy is from '94 to 2006. The
20 same thing with respect to the RICO conspiracy. So even if you
21 find that he dealt drugs in a conspiracy with a bunch of people,
22 even these guys -- but that's not the evidence. Maybe a little
23 bit with Mr. Martin, childhood friends. You have, that's not the
24 count that's charged in Count One. That's not the count that's
25 charged in Count Eight. Those are 12 year conspiracies. And

1 even with the on-or-about language the Court will instruct you
2 on, if you find a five year conspiracy, I submit to you that
3 isn't the 12 year conspiracy that's alleged in the indictment,
4 which is even just solely a drug indictment in Count Eight.
5 Obviously, the RICO conspiracy, a little bit more complicated.

6 Now, I don't want to jump around too much. But I
7 submit to you, let's stick with the conspiracy for a minute and
8 some of the connection evidence. Well, I'll get back to the
9 connection evidence in a minute. Let's stick now to just some of
10 the linear issues with respect to the time line of the conspiracy
11 and some of the multiple conspiracy issues which will kind of
12 amplify on some of the points that some of the other counsel made
13 earlier today.

14 Gardner is convicted and sent away for a couple years
15 in 1999. Whatever happens in this case post 2001 has very
16 little, if anything, to do with Gardner. Now, I'll talk about
17 and we'll confront some of the issues with respect to the Spence
18 homicide in a few minutes. But with respect to, there's very
19 little, if any, drug dealing activity with respect to Gardner
20 after 2001. And the case really focuses on a violent time period
21 between March, April, May, and June, 2002, which makes up
22 generally the focus of the five, of the five homicides that are
23 charged in one way or another here.

24 And so we'll talk a little bit about what goes on in
25 2001 and how that has very little to do with Gardner and nothing

1 to do with, with the charges that were brought in this
2 indictment.

3 Okay. Let's, again, not necessarily skipping around a
4 whole lot, but let's go to Count One and talk a little bit about
5 the RICO enterprise. There's a variety of problems, I submit,
6 members of the jury, with respect to the evidence of the RICO
7 enterprise. One of them is the time frame because what really
8 happens with respect to this evidence is you've got, again,
9 you've got, at least with respect to Gardner, you've got the
10 separate drug dealing or drug issues, '94 to '99.

11 And then in 2001, the focus shifts with respect to the
12 government's evidence here. They sort of downplayed it in their
13 argument yesterday. But this is a bunch of evidence with respect
14 to this entity called Shakedown Entertainment. And evidence from
15 at least Dobropolski and Hayes in which they talk about, like
16 Dobropolski, he's being recruited by Shakedown, which he knows is
17 a music business, he knows that through Harris. And he says that
18 Harris told him that, that they basically rob and do drug deals
19 to finance the Shakedown, to finance the music business. That
20 was his testimony. That was also Rodney Hayes's testimony. That
21 has nothing to do with Shawn Gardner.

22 For all the evidence presented, we don't even know if
23 he knows how to play or can play or cares to play a record
24 player. He doesn't sing. He's never mentioned in any lyrics.
25 He doesn't produce. He has, there's no evidence that he ever

1 sold a CD. There's no evidence that he was at Hammerjacks. He
2 has nothing to do with Shakedown.

3 Now, in the indictment, that matters. One of the
4 purposes of the enterprise -- there's a couple listed. And no
5 one has to be exclusive. That's the law. But it's up to you,
6 applying your common sense, to make the determination as to what
7 exactly was kind of the focus of the organization and make some
8 findings consistent with an instruction that I'll point out in a
9 minute.

10 One of the purposes was maintaining and promoting the
11 rap music business in which members and associates were involved,
12 including Shakedown Entertainment. Shawn Gardner has nothing to
13 do with that. So if you evaluate the evidence that there was
14 basically, say, multiple conspiracies, the first one dealing with
15 Gardner from '94 to '99, which dealt with drugs, and a second one
16 revolving around robberies and, robberies and drug dealing to
17 finance Shakedown, you've got at least two wholly separate
18 conspiracies, two wholly separate concepts. And it isn't what's
19 charged in Count One and it isn't what is charged in Count Eight.

20 So that line of analysis, the result is clear. The
21 government has not established those conspiracies beyond a
22 reasonable doubt.

23 Now, in addition to that, there are some other problems
24 because the government says, well, wait a minute, no, it's
25 beef -- what did I say? They say no, no, no, no, no. It's

1 family and beefs that, we get what we want, and the thing that
2 ties this organization together is family and beefs. We heard a
3 lot of that.

4 Well, there's some problems with that. We heard a lot
5 of that from Montgomery, Reynolds and Bacon. And we also heard
6 Mr. Hanlon make some fairly substantial stretches with respect to
7 what the evidence was and how it should be interpreted and what
8 inferences one can logically draw based on your common sense from
9 the, from the evidence.

10 First off, with respect to the RICO enterprise. I
11 submit, and kind of picking up with some of the other counsel
12 said, the government basically invented this. They named it.
13 They admitted they named it. And the name, the testimony came
14 out through Agent Klas, who took ownership in naming it the first
15 time when it was the Mitchell organization.

16 Now, I submit to you that I think he was, that he did
17 expect that question and he saw on the top of his report, that
18 ATF report said Mitchell organization, so he took credit for
19 that. But in any event, we're in the fourth indictment. The
20 name of the indictment, the name of the group has changed. The
21 government admitted they made it up.

22 Mr. Hanlon said it could have been the Clark Kent
23 organization. I would be very surprised if any indictment
24 brought down by this office ever since RICO was enacted in 1970,
25 that any federal prosecutor ever would have named it the Clark

1 Kent organization. They give it names because they're trying to
2 create some boundaries and some structure that are required under
3 the statute that doesn't otherwise exist.

4 Now, again, they are correct, and the judge will
5 instruct you on this, that the name of the enterprise is not a
6 requirement. There can be an informal association in fact.
7 That's fine. Okay? But the absence of a name matters. It
8 matters in an evidentiary sense because in the absence of a name
9 you're left groping for, what is the self-definition?

10 If people define themselves as being part of that
11 group -- and by the way, other than these recitations of the word
12 "family", the government never really asked these guys do they
13 belong to the organization.

14 Bear with me for just a minute. This was the chart the
15 government used in opening statement. If I put it up here.
16 Because this one is going to be a little bit too difficult for me
17 to hold. If it is, I'll be the round lady, I mean at the boxing
18 match, if I have to again. But this is the government's chart.
19 And they never really explain what this meant in opening.

20 I believe there was a reference -- and again, your
21 recollection controls, even though the arguments of counsel
22 aren't evidence -- I believe Mr. Hanlon at some point said that
23 the people in the red box were the enterprise. If I'm wrong on
24 that, I apologize. I just think he said that. That's what my
25 notes say.

1 But we've got an interesting chart here because we've
2 got suppliers up here. Then we've got these three arrows down.
3 You would think that the three arrows seem to be going toward
4 three distinct columns. But that's not it. That wasn't the
5 evidence in this case, even if you believed all these guys,
6 because this seems to say that cocaine and crack go down the
7 first column to the four defendants and heroin goes down to the
8 three and this one goes here. That's not what, and that wasn't
9 the evidence in the case. The government's never argued that.
10 Maybe their graphics thing, that was just the best way they could
11 do it. Maybe it's all these guys spilling down into the red box.
12 Okay. All right.

13 But this appears to be the organization, at least as
14 the government is claiming, is the Randallstown/Park Heights
15 organization, which used to be the Mitchell organization which,
16 according to Mr. Hanlon, could have just as easily been named the
17 Clark Kent organization. But Mitchell organization connotes a
18 leader. Randallstown/Park (sic) organization connotes a
19 geographic area. Those names matter to kind of form an
20 artificial sense, admittedly invented by the government, to a
21 group that doesn't otherwise doesn't self-define themselves.

22 Montgomery, I'll talk about him in a minute, said
23 they're family but he doesn't know or didn't know Willie Mitchell
24 very well. And, you know, in his testimony, which is
25 inconsistent all over the board on many respects, he says one

1 thing on direct, he'll say the next thing on cross because, yes,
2 yes, a lot of the questions were long paragraphs. The witness
3 answered yes, was sort of hard to say what he's really saying,
4 anyway. But in any event, you've got the box down here which now
5 I think the government's saying represents the organization. But
6 a lot of these people testified.

7 Bacon, he said it was family. He was never
8 specifically asked, Do you belong to this organization? I don't
9 think they asked Herbert when he was called by one of the
10 defendants. But also, this is very unusual, too, because this
11 thing shows the suppliers not in red box.

12 Now, I remember when Agent Ellington was testifying, he
13 talked a little bit about in his non, he's not a lawyer, he
14 thought that in some respects that suppliers could be part of a
15 group or an enterprise. But he was not talking as a lawyer. And
16 he certainly wasn't talking with the benefit of looking at, you
17 know, 200 pages of instructions.

18 Now, I believe Mr. Lawlor yesterday gave an interesting
19 example of, hey, if you got a couple extra tickets on Stub Hub
20 and somebody else does, too, and you're selling them both at
21 Camden Yards, Stub Hub may be the supplier but Stub Hub is not
22 part of the scalping enterprise between those two people. So
23 maybe the government up here figures that the suppliers, at least
24 on this chart, they didn't want to put down here. That's very
25 interesting. Again, in my low tech demonstration, I'm just going

1 to flip through it. I am pretty sure -- I have it marked off.
2 The question is, can I find it quickly?

3 Okay. I am going to put it on the DOAR. A little bit
4 clearer. These two, actually. Okay. This was some of the
5 slides from Mr. Hanlon's presentation yesterday. And there is
6 the core group. They've got Darryl Wyche, one of the murder
7 victims.

8 So at the beginning of the case, they got Wyche in the
9 supplier box, apparently not part of the chart here or the, in
10 the group that they're defining. But now he's in the core group.
11 So the government, even after nine weeks, several years'
12 investigation, they can't even figure out who's in the group.

13 That's one of the costs when you're making it up. When
14 I say making it up, I mean a lot of this stuff, a lot of the
15 underlying acts obviously happened. Who's responsible for it is
16 a separate issue. But it matters. It matters that the
17 government can't figure out and be consistent with who's in this
18 core group of this enterprise. But that's part and parcel of,
19 it's not having a name and the change of names and so on and so
20 forth. That leaves some uncertainty and certainly reasonable
21 doubt as to whether or not the charged entity exists.

22 And again, it's better when there's a name than when
23 there's not a name because that at least gives you some concrete
24 starting point. Even though the statute doesn't require it, it's
25 evidence that makes it more likely that they can establish it

1 beyond a reasonable doubt.

2 Now, something else strikes me as odd. Testimony from
3 members of the core group and other members. Well, again, I'm
4 going to take liberties at interpreting that. I obviously
5 haven't had an opportunity to ask Mr. Hanlon what it means. That
6 wouldn't be evidence, anyway.

7 But listed on that list, so first they have Wyche
8 listed. Wyche obviously is not here. He'd be surprised, I'm
9 sure, to know that he was in a conspiracy or in an enterprise
10 that planned to kill him. That does happen once in a while. But
11 I think here would be a stretch.

12 Natasha Wyche was on the stand, given immunity, I
13 believe. I think she would be surprised, she wasn't asked by the
14 prosecutors, she considered herself as part of the group. I
15 doubt she did. But in any event, these are inherent problems in
16 trying to define this group.

17 Now, some other thing is the need to be talked about
18 with respect to the group, and that takes us back to Montgomery,
19 Reynolds and Bacon. Let me first start with Bacon. Okay.

20 Bacon's an interesting guy. And Mr. Hanlon had several
21 things to say about him. And again, I, too, like Mr. Martin,
22 have been curious about some of the transcripts. I've got a
23 bunch of them. I'm not going to read them. Your recollection
24 controls of the evidence.

25 But when you look back at what Mr. Hanlon said, look

1 back very carefully in your notes to figure out what your notes
2 say and your recollection with respect to particular pieces of
3 evidence.

4 Now, with respect to Mr. Bacon, Mr. Hanlon said a lot
5 of things that simply are liberal, liberal extensions of what the
6 testimony was in this case. And that's basically saying it in a
7 nice sort of way. Let me take this down for a moment.

8 Okay. He talked about, this is going to focus in on
9 family and, because, again, these are the lifeblood, I forget the
10 exact words that Mr. Hanlon used, type structure, family
11 alliance, look out for each other, the heart and soul. The heart
12 and soul of the organization. Okay.

13 Now, a couple things. Remember when Mr. Hanlon was
14 saying, well, you know, Mitchell's alibi with regard to L. L
15 doesn't exist, it's just his word. Well, a lot of these beefs,
16 and again, these guys aren't stupid. They know, they want to
17 stay out of federal court at all costs. It's been pointed out
18 that state sentences are generally lighter. And they understand
19 federal court. They actually do have Ph.D.'s in racketeering or
20 at least they have Ph.D.'s as to what it takes to get the
21 legitimate currency from the government or the coin of the realm
22 from the government.

23 And it's devalued currency because they come in here
24 and testify. And all of the plea agreements are in evidence. I
25 could have gotten them. I had too much of a mess here, anyway.

1 But if we would have stacked them up, it would have been a lot of
2 pages. All right?

3 I submit to you that those plea agreements aren't worth
4 the paper they're printed on and it's not because I say so. It's
5 because, as Mr. Hanlon says, actions speak louder than words.
6 These guys commit perjury. A couple of them admitted they
7 committed perjury. You're supposed to, if there's a correction,
8 let the government know and you can go back and correct it. That
9 never happens. It's only when their next, you know, session
10 comes up or something other happens that they then say, Hey, you
11 know, I committed perjury.

12 But that's supposed to, all of the things that are
13 built into those agreements that are supposed to help build up
14 the credibility, they never suffer, they never suffer any
15 consequences. Perjury? Gun charges? Murder? Well, there was,
16 the murder here was before the plea agreement. But perjury, gun
17 charges, all sorts of other minor scrapes.

18 The government never has the hammer or the wherewithal
19 to say, you know what, we're going to cut these guys loose. Why?
20 Because it's too important to their case. They've sort of -- and
21 they don't do it, I'm not saying they don't do it purposely, but
22 there's an institutional investment in a theory. And these guys
23 are important.

24 Mr. Hanlon said that for several of the counts with
25 respect to the Spence -- and again, I'll get to the Spence in a

1 minute. But again, the importance of Spence in this forum is not
2 whether a murder took place, that's sort of counter-intuitive,
3 that's obviously important, but that the Spence count also
4 requires that that murder have been done to either maintain or
5 increase one's position in a criminal, in the charged
6 organization. So I'll talk later about the instructions and
7 about how if you don't find the predicate of the RICO conspiracy,
8 many of the other counts, the Court will instruct you on this,
9 well, it's derivative. So if it's not guilty on that, that will
10 fall.

11 But again, critical to the Spence count is also proving
12 this aspect of, that it has to be in furtherance or to maintain
13 or increase one's position. So you just can't prove the murder.

14 I'll talk more about that in a minute. But getting
15 back to the cooperators. Okay? They enter into these plea
16 agreements and have all sorts of, you know, horrible things are
17 going to happen to them if they don't tell the truth. But
18 because they are consciousness sociopaths who have total
19 disregard for the truth, they do all sorts of things to breach
20 the agreements and the government doesn't say, We're going to cut
21 you loose, because they're too invested. Several of the counts,
22 Mr. Hanlon even said, rise or fall, essentially, on the say-so of
23 Mr. Montgomery.

24 Now, so these plea agreements, though, the one point in
25 the entire trial where apparently a line was crossed was

1 Reynolds. And you know what it took to get Mr. Harding even to
2 sort of in some sense say, Judge, I'm not going, keep him in it
3 for all I care, and that still didn't work? Reynolds was caught,
4 I think one of, one of defense counsel said with 60 pounds of
5 marijuana. 54. 54 pounds of marijuana. It took 54 pounds of
6 marijuana to at least get some small sense of, look, there's a
7 limit as to what I can do for you. But even still the testimony
8 was he was still released because the machinery of the
9 cooperators is too much.

10 Again, you don't need cooperators to have Gardner
11 convicted. I take that back. You don't need cooperators to
12 establish that Gardner was involved in drugs from '94 to '99.
13 And again, he's been sentenced and, convicted and sentenced for
14 that in state court. So he's paid some consequences with respect
15 to that charge. Okay.

16 THE COURT: Mr. Kurland, I'm sorry. I'm going to have
17 to interrupt you for a moment.

18 Ladies and gentlemen, I'm going to excuse you for a
19 five minute break. Please return to the jury room. Leave your
20 note pads on your chairs, please.

21 (Jury exits the courtroom.)

22 THE COURT: I'm awfully sorry, Mr. Kurland. One of the
23 jurors needed a bathroom break. I should also mention, if I
24 didn't before, apparently, one of the jurors is not feeling well.

25 MR. KURLAND: I hope I didn't cause that.

1 THE COURT: You've used 45 minutes.

2 MR. KURLAND: Okay.

3 THE COURT: Okay? I don't intend to take a recess now.
4 I just wanted to give the jury a break. This won't come off your
5 time.

6 MR. KURLAND: Okay. I appreciate it. I was just, I
7 was concerned, frankly, that I had said something. I didn't
8 think I had.

9 THE COURT: No. I hated to do it.

10 MR. KURLAND: Okay.

11 THE COURT: The juror signalled to Ms. Arrington.

12 MR. KURLAND: All right.

13 THE COURT: You know, there are some judges, not any in
14 this courthouse, who would have said to the juror, All right,
15 you're excused for a few minutes. But I don't think that's
16 appropriate.

17 (Jury enters the courtroom.)

18 THE COURT: Thank you, ladies and gentlemen. Mr.
19 Kurland, you may proceed when you're ready.

20 MR. KURLAND: Thank you, Your Honor. All right.
21 Members of the jury -- okay. Getting back, and I want to go
22 through Bacon and a couple of the cooperators again.

23 Again, with respect to Bacon and this evidence of
24 family and beefs, with respect to the beefs, Mr. Hanlon made a
25 big point and said, Well, remember, Mr. Bacon talked about that I

1 think Gardner helped him settle this beef with yet, not settle
2 this beef, Bacon had a beef with Tuffy and Bubbles. Sort of
3 sound like names out of that old TV show Family Affair with Mr.
4 French and Buffy and whatever. But in any event. Tuffy and
5 Bubbles. Okay? Now, there's no proof that these guys ever
6 existed. It's very easy for Bacon to come in. Remember, the guy
7 admitted he committed perjury and some other lies. Well, yeah,
8 Tuffy and bubbles. I had this beef with Tuffy and Bubbles and
9 Gardner helped me. What happened? Anybody get shot? No, never
10 found them.

11 This is a relatively small community, these Baltimore
12 drug dealers. You'd think that there's a blood oath of Tuffy and
13 Bubbles. You look for them for a day, you don't find them? You
14 just go on with your business? I don't know if Tuffy or Bubbles
15 exists. Okay? But to take that as evidence that these guys
16 protect each other in beefs, you can't do it. There is no proof
17 beyond a reasonable doubt that these guys protected in that beef.
18 Just couldn't happen.

19 Also, I think Bacon talked about, well, he was hurt in
20 a shooting. Or he got wounded, whatever, in some beef. Did he
21 ever go to hospital? No. There's not even a hospital record of
22 that beef.

23 Same thing with Montgomery. He talks about, he's going
24 to help me out in the Tyree Stewart beef. Well, we know how that
25 turned out. That was the one that had some relationship to when

1 Montgomery then killed cheeks. All right? But in any event,
2 there's no proof that Gardner or any of these guys ever came to
3 anybody's assistance with respect to these beefs, except perhaps
4 Hammerjacks. But that has nothing to do with Shawn Gardner.
5 Bone mobilization notwithstanding. We'll talk about that in a
6 couple of minutes.

7 In fact, with respect to McCaffity, which if we can
8 figure out that homicide at all, it is clearly, I shouldn't say
9 clearly related, but that was the homicide that took place after
10 the fight at Hammerjacks that had to do with Def Jam Records and
11 Lyles's birthday party, whatever. So it was arguably related as
12 some sort of revenge dealing with Shakedown Entertainment, of
13 which Shawn Gardner had nothing to do with.

14 By the way, Gardner's not even charged in the McCaffity
15 homicide. So the only evidence here that anybody's coming to
16 help out on beefs, if you want to interpret the evidence that way
17 with respect to the McCaffity incident, Shawn Gardner has nothing
18 to do with that.

19 There is no evidence at all that these people are part
20 of a, are part of a family because they go to each other's aid
21 with respect to beefs. It's unproven. If the government can
22 say, Hey, man, we don't believe Mitchell because L doesn't exist,
23 then you can't believe Tuffy and Bubbles just because these guys
24 say so.

25 So the evidence that these guys are coming to each

1 other's attention to add the dimension that is the heart and soul
2 of the organization -- it's laughable that anything related to
3 Montgomery would ever be characterized as the heart and soul of
4 anything.

5 But in any event, the evidence that there is this,
6 these guys come to each other's aid with respect to beefs doesn't
7 exist other than in words. Mr. Hanlon himself said, actions
8 speak louder than words. He said that five times. It's on his
9 slide presentation, whatever you want to call it. All right?
10 Action speak louder than words.

11 Just words. Just words that you wouldn't necessarily
12 believe from a lay witness you'd have some doubts about. You
13 certainly have to have doubts about it coming from these guys.

14 All right. Also, and again, because I know I'm sort of
15 running out of time. I don't want to go through every little
16 square on the chart. But Mr. Hanlon also made some references
17 to, well, Gardner is involved in these other two murders. He's
18 not charged in McCaffity. And his umbrella involvement of the
19 mobilization, he went out to prison to warn Bacon that Bacon
20 might be in danger because Bo was in danger after McCaffity.
21 Your recollection controls. If you can -- I don't know the whole
22 issue with respect to your access to transcripts or if you want
23 readbacks, whatever, but I submit to you the evidence shows that
24 Gardner, the testimony is Gardner went out and talked to him
25 about the Hammerjacks incident. There's no warning. Talked

1 about it.

2 Again, these rumors are flying around. They went out
3 and it came up in conversation. Nothing in the testimony of
4 Bacon said that it was a warning. It was just something they
5 talked about. There's a huge difference.

6 Same thing with respect to, you know, the Wyche
7 situation. I submit to you, again, kind of roundabout way to get
8 to the Wyche brothers murder, there's zero evidence of Shawn
9 Gardner's involvement in the Wyche brothers murders. Zero
10 evidence. Okay? He's not, no one witness, no witness at all
11 said his name was on the tape. He's not -- on the voice mail.
12 He's not around at all. And the evidence that came in from three
13 or four witnesses, or two or three, Bacon and Montgomery, all
14 have Gardner. And to this extent, I guess they drew a line as to
15 just how phantasmagorical they wanted to be.

16 They talk about Gardner and they make it clear, Gardner
17 isn't confessing to his involvement. Gardner, according to their
18 testimony, if you even believe that those conversations took
19 place, Gardner talks about how he has heard that the police have
20 this. And in one instance there was a rumor on the street that
21 somebody, you know, said that his name was on the tape even
22 though there's no evidence of that. Nobody testified that his
23 name was on the tape. That's the whole Claudus Lassiter bit.

24 But again, he's not going out there, you know,
25 basically saying that, you know, we got to get Lassiter because

1 he's, he's implicated me. He doesn't say that at all. Bacon
2 doesn't say that at all.

3 Gardner, if you believe the government's witnesses on
4 this point, is simply, is telling them stuff that he has heard
5 second or third hand. There is zero evidence that Gardner is
6 involved in the Wyche brothers murders.

7 Now, there's a theory of the case instruction where, if
8 you find they're in a conspiracy, you may find, you're not
9 required to, the judge will instruct you that, you know, that you
10 may find if he's part of the conspiracy that he's responsible for
11 every act that's reasonably foreseeable in furtherance of the
12 conspiracy.

13 But let me tell you this, members of the jury. If you
14 get to that point, you've already found that he had nothing to do
15 with it directly. And now it has to be, well, is he part of the
16 conspiracy and is it reasonably foreseeable, so on and so forth.
17 Inasmuch as it's hard to figure out what the motivation was for
18 that. If he's not part of the conspiracy, even that general
19 conspiracy theory of liability isn't going to find him guilty.

20 But with respect to direct evidence, he's not there.
21 Well, the government says, Well, wait a minute, mobilization.
22 You know, that sounded, we heard that three or four times from
23 Mr. Hanlon. All of a sudden cell phone calls. Cell phone calls
24 from phones associated with these guys. Okay? We heard a lot of
25 testimony about that. So we can't even be sure. Now, maybe

1 through inferences that it's found on them. But we don't have
2 direct evidence. Let's put it this way. We don't have direct
3 evidence as to who was even calling who. Okay?

4 But let's assume that we read the inference
5 instruction, which basically says that if it's dry here and if
6 two people walk in with umbrellas dripping wet, we can infer even
7 though there's no open windows, that it's raining outside.
8 That's circumstantial evidence. That's obviously a very basic
9 example. And you're permitted certainly to draw even more
10 complex inferences. But the inferences have to be rational based
11 on common sense and it just can't be speculation.

12 So we can infer, based on the fact that a phone is on
13 somebody or that there's a pattern of calling and they know
14 someone, I'm willing to submit that under certain circumstances
15 you can infer from the phone records that, well, this guy was
16 calling this guy, even though there's no direct evidence of that.
17 But to infer from that the substance of the conversation and to
18 be convinced beyond a reasonable doubt they were mobilizing is
19 folly.

20 That isn't piling legitimate inference upon inference.
21 That is, if not fantasy, that is speculation.

22 So this concept that Gardner, Mr. Gardner's involvement
23 in the Wyche murders, because there's a couple of phone calls
24 that evening to Martin, his childhood friend, who if you look at
25 the phone records they've been calling each other on a million --

1 I don't want to totally exaggerate. They've been calling each
2 other a lot. Over every period that there are phone records,
3 they call each other a lot. They've been childhood friends for a
4 long, long time. And in fact, again, the evidence is what it is
5 on that point.

6 You know, the whole I-95 stop, whatever. They were
7 together in separate cars there.

8 So even if you want to infer that they were calling
9 each other, to suggest that it was a mobilization is simple
10 speculation. There is zero proof of that. To take those phone
11 records that Agent Benson so painstakingly put together and to
12 say that that's now evidence of mobilization, therefore, they're
13 coming to each other's aid is ridiculous.

14 Let me just say one other thing. We've all been to the
15 movies. Maybe with DVD's we all sit home now. Maybe we don't go
16 to the movies as much. But I have a faint recollection that
17 every time you go to the movies they still have that little
18 warning that comes -- it's not a warning -- that polite thing
19 coming on as to make sure you turn your cell phone off. Is it so
20 unreasonable that Mr. Gardner called Mr. Martin during a movie
21 and that Mr. Martin answered the phone? Maybe to the chagrin of
22 a couple of other people in the movie theater. But that cannot
23 be evidence beyond a reasonable doubt of some mobilization.

24 So with respect to the McCaffity count, Mr. Gardner is
25 not even named as a defendant in that count. With respect to all

1 of the Wyche counts and all the derivative counts that flow from
2 that, there is zero evidence of Mr. Gardner's involvement.

3 Even though there's evidence that he's talking to other
4 people about rumors he has heard, if there's one thing that has
5 been proved in this case beyond a reasonable doubt, is that a lot
6 of rumors go around -- and that's what they are, rumors -- about
7 a lot of things. But that's not evidence beyond a reasonable
8 doubt.

9 Now, let's talk about Montgomery and the context of
10 Montgomery -- oh, let's do Montgomery and Reynolds. And I'm
11 going tie that up with respect to some of the phone stuff, and
12 then, and then the guns, and then I'll make some concluding
13 remarks.

14 Now, the Spence homicide. A lot of evidence in it.
15 It's different in quantity of evidence. We've got some
16 eyewitnesses we'll talk about, and we've got some law enforcement
17 witnesses, and we have Montgomery's testimony.

18 Now, a couple of things that are worth pointing out.
19 Now, I'll get into the substance of the homicide in a minute.
20 But I do want, I don't want to forget so I want to talk about it
21 right now. I want to talk a little bit about the, the paying for
22 the lawyer. Now, this is important because, again, if you find
23 that Gardner is not part of the enterprise or if you find that
24 they haven't proved the enterprise, your job is done with respect
25 to the Spence counts because those counts require that the

1 killing be, again, to maintain or increase one's position in the
2 enterprise or in the count of drug organization, which we've
3 already talked about, because of the scope and the length of
4 that, they haven't proved that, either.

5 But assuming we get over all those hurdles, and I
6 submit to you that you'll never even reach this point, but if you
7 do and it turns now on whether or not his involvement in the
8 Spence homicide was to maintain or increase his position in the,
9 in the charged enterprise. And the jury instructions lay this
10 out.

11 And it says that it doesn't have to be a sole purpose.
12 It could just be a general purpose. But the purpose, though,
13 still has to prove beyond a reasonable doubt. And that's not
14 insignificant.

15 So if he is committing this robbery that turns into a
16 homicide, even to, even if it's just one of his motivations to
17 pay for Martin's lawyer, then that arguably is some piece of the
18 government's, these guys are family and are watching out for each
19 other.

20 Okay. Couple of things. One, the whole thing about
21 paying for a lawyer. Mr. Hanlon said yesterday that Bacon got a
22 couple of thousand dollars from Martin when he was locked up to
23 help pay for a lawyer. That was not the evidence, members of the
24 jury. The testimony was that he got a couple of hundred dollars.
25 I looked at the transcript. Your recollection controls. Your 12

1 or 13, you'll eventually be 12 deliberating. That's not an
2 insignificant misstatement. That is a gross exaggeration. A
3 couple of thousand dollars. That's not the testimony, members of
4 the jury. I submit to you the testimony was a couple hundred
5 dollars. All right?

6 And he's talking about his appeal, whatever, so on, so
7 forth. A couple hundred dollars is not going to buy a lawyer.
8 Maybe it will get you some canteen money. They're friends, after
9 all. You're allowed to get, it's not criminal to give some money
10 for some friends. A couple hundred dollars is not a couple of
11 thousand.

12 So view with great care all of the representations in
13 that chart.

14 Now, getting back to Mr. Montgomery. Mr. Montgomery,
15 late in the day, late in the game, after many proffer sessions,
16 after a recorded transcript with several assistant U.S.
17 attorneys, several federal and state investigators, Detectives
18 Marll and Tincher -- we heard from Marll -- and Dean Stocksdale
19 from the State's Attorney's Office, when he's recorded, sort of
20 in the middle of the investigation but after he's already decided
21 to, you know, cut his deal, not be charged with, or getting a
22 deal on the Cheeks murder, not being charged in the Spence, in
23 the Spence case, he's asked about Gardner. Was there any
24 particular reason that Gardner -- and again, remember, keep in
25 mind, he admits that this was all his idea. This was the back

1 and forth with respect to, with Mama and with Darius Spence. I'm
2 going to talk about in a minute.

3 But with respect to Gardner's involvement, was there
4 any particular reason why Gardner was or was part of the plan?
5 Again, Mr. Coburn played this tape for you. And his response
6 was, um, he told him about it. He had took a nice fall around
7 that time. Okay? In his grand jury, the topic doesn't come up.
8 Or that's the government's characterization of his grand jury
9 transcript. And then at trial he says to pay for a lawyer. A
10 couple of problems with that.

11 One is that the Spence murder is June 7th. Mr. Martin
12 is arrested April 17th. Mr. Montgomery testifies the
13 surveillance period alone with respect to the Spence homicide was
14 two months. That meant that the surveillance period, if Mr.
15 Montgomery is to be believed, had to start on April, at or around
16 April 7th. Ten days is a fairly substantial amount of time if
17 you're dealing with a two week period. And that's only the
18 surveillance period. For him to get involved, remember, there
19 had to be that little minuet or dance with the back and forth
20 with Mama and Darius and so on and so forth.

21 The bottom line is, Gardner's not arrested and doesn't
22 even need a lawyer until April 17th. The surveillance period is
23 two months long. Which means that the derivation of the plan had
24 to be sometime early April, March, whatever. It had nothing to
25 do, it had nothing to do with paying for Martin's lawyer. Now,

1 Montgomery says that but it's kind of cooked up after a zillion
2 proffer sessions.

3 And I asked Detective Marll, who was the lead
4 investigator on that case, I asked him, I said, motive evidence,
5 when another flip witness or cooperator is going to, basically,
6 you're going to cut a deal with them and they're going to,
7 they're going to implicate somebody else, isn't it important
8 stuff when he gives the motivation for why that other guy was
9 committing the crime? And that's critical evidence. And he said
10 yeah. And I said, wouldn't that expect to be written down? He
11 said, not only written down, or recorded.

12 But there's no other recordation of this. It's not
13 asked in the grand jury. It's not asked at all. It simply just
14 shows up in his trial testimony because he's finally figured out
15 after one of the other counsel pointed out, after a series and
16 series and series and series of proffer sessions, he's able to
17 figure out, he does have his Ph.D. in racketeering, and he's able
18 to figure out it's important to have that lawyer connection with
19 respect to, with respect to that.

20 So that is, that's unbelievable testimony, I submit to
21 you, and it's directly contradicted by his other statements that
22 there was a separate motivation for Gardner's participation in
23 the plan. If you believe that -- and it has nothing to do with
24 paying for Martin's lawyer. And therefore, it's not to maintain
25 or increase one's position in the enterprise.

1 The government in their little chart suggests, and I'm
2 sure they'll argue that, well, wait a minute, this has something
3 to do with, it was expected of him. That's what these guys kind
4 of do. So it was expected of him to participate in a drug
5 robbery, another, a trap. They're all traps.

6 This one has nothing to do. It's not the same MO. It
7 has nothing to do and it's nowhere near in the same manner as the
8 other homicides. But they're all traps. And because it's
9 robbing a drug dealer, Gardner was expected to do it.

10 Well, that's the language of the statute. But that's
11 not proof. There's zero proof of that. Now, there's one other
12 thing with respect to the, the legal fees, and that's Mr.
13 Martin's mother. She might have a little, or even not so little,
14 problem in getting the money together. But she testified that
15 she was paying for the lawyer. The family came up to help her
16 out with the down payment. And she was paying on an installment
17 plan. An installment plan.

18 You think Mr. Gardner's going to say, you know what? I
19 really want to help her out? I've done all these other things,
20 but, boy, you know what? The installment plan is too onerous so
21 I'm going to commit a robbery so I can pay for Martin's lawyer.
22 It does not ring true.

23 There is no credible evidence that Martin, that Mr.
24 Gardner had anything to do with the Spence homicide for the
25 purpose of maintaining or increasing his position. And we're in

1 federal court now, and that is a required element of the statute.

2 You might think, wait a minute, now. How could that be
3 equally important to the murder? It's sort of like the bullets
4 that Mr. Klas and one of the other ATF agents testified to. How
5 important is, that a bullet travels in interstate commerce?
6 Well, that's an important element in the federal sense. I'm not
7 saying that's as important or as morally blameworthy as drug
8 dealing or homicides, so on, so forth. But these are elements
9 that need to be established beyond a reasonable doubt.

10 The Court is going to give you that dual sovereignty
11 instruction which says that as you deliberate on this, nothing
12 you decide here will have any legal effect on whether or not the
13 State of Maryland can bring additional charges for any of these
14 underlying offenses. The Court already instructed you on that a
15 couple days ago. You're going to get that identical instruction
16 again.

17 You need to focus on the elements. And if that's the
18 element that is not established beyond a reasonable doubt, then
19 just like any other element that's not established beyond a
20 reasonable doubt, the government hasn't proved that count.

21 Now, I know there was one other thing I wanted to say
22 with respect to -- oh, the legal fees. And that's, the
23 corroboration evidence from Mr. Reynolds. This was interesting.
24 Just if I can find -- and Your Honor, I'll just have about ten
25 more minutes. Maybe I should have said five. Okay. The

1 corroboration evidence. Some was here.

2 Okay. Reynolds. If I can find -- Reynolds is one of
3 the witnesses whose excerpted grand jury testimony is going to be
4 presented to you for your consideration.

5 Reynolds says now, he testified again that, yeah, that
6 he was talking with Gardner -- I got it right here -- and Gardner
7 told him, Gardner told him that he participated in the Spence
8 robbery because he wanted to get money for Martin's lawyer. Now,
9 Reynolds testified before the grand jury. Memory serves, he
10 testified twice. Now, again, let's understand the grand jury.

11 This case, the investigations have been going on for a
12 long time. The government, this evidence came out of trial.
13 This isn't just criminal procedure. That the government calls
14 witnesses before the grand jury. The government alone. There's
15 no defendant there. There's no defense counsel there. There's
16 no judge there. Just a prosecutor there asking questions that
17 are under oath. After they go through all the proffer sessions
18 they try to lock in the testimony under oath. And they do it for
19 good reason because if they testify differently at trial and it's
20 determined not to be a genuine "I don't remember" or they just
21 testify differently, the government has locked in under oath
22 testimony that's admissible as substantive evidence in this case.
23 All right.

24 That's important stuff. It's not a trivial matter to
25 testify before the grand jury. And the government controls

1 everything.

2 Reynolds testified before the grand jury. I'm just
3 going to read you a very brief excerpt which is an exhibit. It's
4 admitted into evidence and you'll have something similar to this
5 with you in the jury deliberations.

6 Question: I see. And this is just the bottom of one
7 page and directly on the other. I see. Did you speak to Goo
8 after Wayne got locked up in 2002? Yeah. We were cell buddies.

9 Question: I see. Did he talk to you about Wayne
10 needing money for something? Yeah.

11 What did he need money for? A lawyer.

12 Okay. What was Goo locked up for when you were cell
13 buddies with him? Murder.

14 Okay. Did he talk to you about the murder? Yes.

15 What did he say? And then it goes on and says that he
16 went with a couple other guys to a guy's house. They said they
17 had 50,000 in the house. They went there. His girlfriend was
18 there. She opened the door and she ran, she jumped off the
19 balcony. There's a description as to what happened.

20 There is nothing about needing money for lawyers. You
21 will be able to read this more carefully and more slowly in the
22 jury room. But the under-oath testimony of Mr. Reynolds, these
23 were two separate, distinct topics. He mentioned that Martin
24 needed money for a lawyer. And then, I won't even say segued,
25 because they started then talking about, and what was the

1 government, the prosecutor's question? Okay. Right after. What
2 did he need money for? A lawyer. Question: Okay. What was Goo
3 locked up for when you guys were cell buddies with him? Murder.
4 And then there's a little description of the murder.

5 The fact that the discussion of Martin needing money
6 for a lawyer and the discussion of the murder that follows are
7 not connected at all. Their only connection, and I hate to even
8 use that term, is that they are two discrete topics that follow
9 each other in part of the conversation. But to twist this, to
10 suggest that, well, this means that -- there's nothing in here
11 that says that he needed money for a lawyer, and this was under
12 oath. This is flatly inconsistent with his also under-oath
13 testimony here.

14 But again, he got the, you know, he finally read the
15 program, too, and realized, you really don't need that Ph.D. in
16 racketeering to be able to figure out that the connection
17 evidence is so important.

18 Mr. Hanlon asked him -- I believe it was Mr. Hanlon.
19 I'm pretty sure. May have been Mr. Harding. But the transcript,
20 Mr. Hanlon goes, well, you weren't asked that in the grand jury?
21 Well, whose fault is that? These guys controlled the
22 questioning. This is important. These guys can call these guys
23 back time and time and time again. If it's important now, if
24 it's so important that it takes up five or six little squares on
25 Mr. Hanlon's presentation, it certainly was important back at the

1 grand jury when he declined to ask the question.

2 The whole point is, is that Mr. Reynolds had an
3 opportunity to talk about Mr. Martin's need of a lawyer and the
4 murder and there was never any connection. I submit to you there
5 is insufficient evidence beyond a reasonable doubt to establish
6 that Mr. Gardner's motivation or his intent to deal with the
7 Spence situation had to do with wanting money for a lawyer. And
8 when that connection is uncoupled, then whatever you find Mr.
9 Gardner's involvement in with respect to the Spence homicide, he
10 is not guilty, I submit to you, of these charges because those
11 killings were not in connection with the county drug conspiracy
12 and they were not in connection with his attempts to maintain or
13 further his position in the alleged enterprise.

14 So again, even if you find the enterprise, you find him
15 a member of it, which I don't think the evidence supports, you
16 get down to this point, zipo. The corroboration on that isn't
17 there. Neither piece of evidence with respect to the lawyer
18 stands, stands independently.

19 The one other thing. Dobropolski, one transcript of
20 his conversation that he had with, with Harris was admitted. And
21 there's a discussion on this with Dobropolski talking with
22 Harris. And they mention that Bo is still locked up. Now, Bo
23 was supposedly the first among equals in some respects, okay?
24 He's still locked up. You'd think that if this was part of their
25 whole, again -- what's that term? Part of the heart and soul,

1 that they wanted to do everything they could to get Bo out of
2 prison -- well, again, this isn't the testimony from the stand.
3 This is what was taped. Okay?

4 Talking about Bo. Rock. That's who's blanking with
5 him for to come home now. I got to go. I got to take some shit
6 down there to him, too, man. Got to take some shit down to jail
7 with him. Dobropolski: He's locked up still? Yeah, he's still
8 locked up. Got to go to court in February. For the same shit?
9 Yeah. For the same shit. Damn, he told me he was going to beat
10 that shit. Yeah, but he's still fighting. Damn, he ain't got no
11 bail? No, I don't think so. Nope, he ain't got it. There's no
12 effort to, got to get a bail, man. We got to rob, kill somebody,
13 whatever. That's because there's nothing in this, these guys
14 about needing money for lawyers. There's no credible evidence of
15 that.

16 When I asked Mr. Dobropolski, when he was being
17 recruited by Shakedown or Sheistyville, I said, they ever talk
18 about, he said, Hey, man, Sheistyville was a place where they
19 robbed and, and did drugs to support the music business.
20 Anything about robbing to help pay for lawyers? He looked at me
21 like I was nuts. That's not what these guys were about. There's
22 no evidence of that.

23 Very quickly, I want to talk a little bit about the
24 substance of the Spence murder. A couple things that Mr. Hanlon
25 said. He stood here with unbelievable certainty. Some things

1 are more obviously more established than others. But even with
2 respect to Mr. Gardner's involvement in the Spence homicide, I
3 just wanted to point out a couple of things.

4 This is, we saw this a lot. This is the Bramble chart.
5 Remember the bread crumb, the trail of bread crumbs? And I don't
6 know if Mr. Hanlon omitted this, but I was taking down notes
7 here.

8 He did the bread crumb trail of all the things that
9 were found. He left one thing out, it's pretty significant. He
10 left out recovery of walkie-talkie, approximate location. Why
11 did he do that? I submit to you he left that out because the
12 evidence doesn't neatly fit in that one. Why? Because Mr.
13 Montgomery testified that he threw the, the walkie-talkie out the
14 window. Okay. However, what Mr. Gardner's car was recovered a
15 week later, there was a walkie-talkie in it. All right? That
16 was the car that Mr. Montgomery had when he drove away. So if
17 he's two things.

18 If he's throwing it out the window, why is there one
19 still in the car? You would think that this one here, location
20 of the walkie-talkie, if that's in a storm drain, you would think
21 that that was the one that was thrown out. But that can't be
22 because when Holly and Gardner were arrested, nobody had a
23 walkie-talkie on him. The only walkie-talkie they found was that
24 one in there. So we would assume since that's sort of near where
25 they were arrested, arrest location, well, the walkie-talkies

1 don't add up.

2 Well, you know what? With respect to certainty of,
3 with respect to certainty of Mr. Hanlon's presentation, even some
4 of this stuff really isn't that certain. How did that
5 walkie-talkie get there? Was that part of the bread crumb trail?
6 Was that Montgomery's? If it's Montgomery's, why is there
7 another one in the car? Remember, Montgomery said he was out and
8 about. Andrea Smith didn't see him. But Montgomery said he was
9 out and about near the thing.

10 I'm just suggesting, members, you're going to
11 deliberate on that element as well, I'm just suggesting that we
12 really don't even really know exactly what happened there,
13 despite all that evidence. And obviously, Mr. Gardner was
14 arrested close by. But we still don't really know what happened.
15 How did that walkie-talkie get there? How did it get there?

16 And if Montgomery is running around, was the one that
17 dropped that walkie-talkie off over here, then maybe he had
18 something to do with the trail of bread crumbs and the dropping
19 off of those guns, which is the last thing I'm going to talk
20 about. And if we're not sure how those guns got there, then even
21 the gun counts, the one that's not derivative of the RICO count,
22 have to fall away as well.

23 The last thing I'm going to talk about is the guns and
24 then I'm done. Then I'm just going to do my wrap-up closing.
25 And that is all these guns. The Eric Lee murder and the

1 government's connection evidence with respect to the guns, to the
2 Wyche.

3 One thing to keep in mind. The guns that are found
4 here, the .40 caliber Glock was unfired. The unfired weapon
5 doesn't connect up to the Wyche murders, doesn't connect up to
6 the McCaffity murder. The McCaffity murder has nothing to do
7 with this. So the supposed connection which proves that Gardner
8 is the gun supplier of the enterprise is through this Eric Lee
9 shooting of which we know very little, if nothing, about.

10 It's a shooting that took place on 3/11/2002. And
11 supposedly there were two guns there. And if you believe the
12 ballistics experts in comparing matched-up bullets, not even the
13 gun, but matched-up deformed bullets -- I don't have time to get
14 them out -- again, so that testimony comes in that there's the
15 comparison between one of the .40 caliber bullets, guns that was
16 used in the Lee shooting, which is an uncharged shooting that
17 nobody's been arrested for.

18 So the state or the police, the prosecutors, whatever,
19 don't even have enough evidence to arrest anybody for it, even
20 under that standard. But the government is asking you to use
21 inference upon inference to infer beyond a reasonable doubt that
22 these have to be the guns that have bodies on them and the guns
23 are connected because one of the Lee guns turns up as the Wyche
24 gun and the other of the Lee guns is matched to the gun that
25 didn't shoot but was found in the forest after the Spence

1 homicide.

2 Let me just say a couple of things about that and then
3 I will give my final comments and I will be done.

4 And that is, we heard a lot of testimony in this case
5 about the, for lack of a better term, the utter promiscuousness
6 as to how guns move around. Even going back to the Duganne
7 sisters, who testified that she grew up with guns, and you get
8 guns from junkies, crack dealers, you steal them, you trade them,
9 whatever, and there's very little connection over even a month or
10 two of being able to say with any level of certainty, let alone
11 beyond a reasonable doubt, that this gun belonged to this person,
12 therefore, they were involved in a shooting or involved, or even
13 had custody of the gun or control of the gun a week later let
14 alone two months later.

15 And listen to the testimony we have in this case. Even
16 the guns that Montgomery says were Mr. Gardner's, they were
17 stored in Mr. Holly's girlfriend's stove, according to Mr.
18 Montgomery. Mr. Gardner doesn't have 24 hour custody of these
19 things. We heard from Mr. Gardner, from Mr. Montgomery that E,
20 Holly was wild. Okay. If E is wild and guns are in his
21 girlfriend's stove, you're going to tell me that this guy isn't,
22 it isn't possible that he's out using them in a manner in which
23 Mr. Gardner knows nothing about?

24 In addition to that, we heard testimony from Mr. Hayes
25 that you can even put a gun -- this is the stuff almost out of

1 Get Smart -- you can even put a gun in a hollowed-out phone book
2 in the ceiling of your basement and still not be confident that
3 it's going to be there, that somebody's not going to take it and
4 use it without your permission.

5 Darius Spence, who, by the way, is totally contradicted
6 or totally gives conflicting testimony with respect to Mr.
7 Montgomery about who approached who first, another thing we got
8 to, you know, keep in mind, about, well, Darius came to me,
9 wanted Mama beat up. No. No. Darius said no way. No price was
10 ever mentioned. Montgomery came to me. So there's all sorts of
11 other things with respect, wrong with Mr. Montgomery's testimony
12 that can't be believed.

13 But going back to the gun stuff. Darius said, Hey, I'm
14 involved in the drug trade or I was, or I am or still am, at
15 least before I got arrested again, and guns are just a part of
16 the business. Guns are traded back and forth and sold and stolen
17 and given over to people who don't know what's going on all of
18 the time.

19 I submit to you there is no rational evidence beyond a
20 reasonable doubt that can tie Gardner back to that gun other than
21 speculation, and that's not good enough. That is not good
22 enough.

23 Now, one other thing with respect to the guns.
24 Remember when Mr. Harding cross examined the Infiniti mechanic
25 about all of the different permutations about how one could, you

1 know, unlock the door, so on and so forth. And I believe -- and
2 if I'm mischaracterizing the testimony, I'm not doing it
3 intentionally -- I believe after six or seven permutations, Mr.
4 Harding told us all that he was bored and he was going to move
5 on. Well, I'm not bored. And I wish I had 10 or 15 more minutes
6 to talk about some other stuff.

7 But when you go back to the jury room, on this point
8 with respect to the guns, and the government, I guarantee you, in
9 rebuttal is going to say a lot about the gun, when you go back to
10 the jury room, amongst yourselves come up with very obvious,
11 plausible explanations as to how those gun connection stuff could
12 very plausibly -- I bet you each in five minutes could come up
13 with two or three different hypotheticals, much like Mr. Harding
14 did, of different ways that guns can get into somebody else's
15 hands which have nothing to do with Mr. Gardner.

16 It was, it takes a couple minutes to do. Mr. Harding
17 didn't just make that up in five minute. He obviously prepared
18 it. And it was effective. But we can do that as well. You can
19 do that as well with respect to the different ways.

20 I submit to you that when you carefully examine the gun
21 evidence, even if you accept the ballistics evidence which, by
22 the way, you're not required to do, about comparing the
23 smashed-up little bullets, not guns that are firing them, I
24 submit to you there's no evidence that ties Mr. Gardner to that.

25 Now, I just want to say one other thing.

1 THE COURT: You should conclude, Mr. Kurland.

2 MR. KURLAND: All right, Your Honor. Thank you very
3 much. The last thing that I'm going to say is that even -- well,
4 two things. Even with respect to the gun, if there's questions
5 as to how the gun evidence plays out, when you look carefully at
6 the counts there's going to be a question concerning even a
7 reasonable doubt as to the gun charges against Mr. Gardner, the
8 ones that aren't derivative, but the last thing that I'm going to
9 say is this. And again, I thank you for your attention during
10 the closing argument and throughout the trial. That's more than
11 I could ever say.

12 The one thing that I want to say is this. The
13 government is going to get its rebuttal. Listen very, very
14 carefully and with a, I don't want to say with a healthy
15 skepticism. Listen very carefully to what they say because at
16 this point -- and again, we've all fought very hard with respect
17 to that, each with respect to our respective clients, so on and
18 so forth. The government, some say, well, this is, they get the
19 final word. They don't. You get the final word.

20 But what we won't have an opportunity to do is to get
21 back up again and respond to these arguments. So there's no
22 question the government knows this and they jealously guard this
23 prerogative because they have a significant burden. But they
24 also know that the lawyers aren't going to get to respond.

25 I used to be a prosecutor, too. And we used to debate

1 if we ever do defense stuff, would you trade the burden of proof
2 to have that last shot with the jury? And some of my prosecutor
3 friends, ex-prosecutor friends would say, Yeah, I would love to
4 have that last shot and give up the burden of proof. I wouldn't.
5 The system the way it is strikes the right balance because you
6 have the final word, even though we won't have an opportunity to
7 respond to their arguments.

8 But I ask one last thing; that when you listen to their
9 final arguments, when you listen to their final arguments, think,
10 in addition to listening to their words, ask yourselves, how
11 would we have responded if we had the opportunity in this court?

12 Members of the jury, I thank you very, very, very much
13 for your attention. Thank you. Thank you.

14 THE COURT: Thank you, Mr. Kurland.

15 Members of the jury, it seems quite apparent that,
16 despite my best hopes, I'm not going to be able to instruct you
17 today. I thought about whether I might try to instruct you in
18 part today but that seems to me to make little sense. We need to
19 take a recess. And Mr. Harding will certainly want to take
20 advantage of the additional time that the government has.

21 So I can tell you we're going to take a 15 minute
22 recess and then we'll resume. And the government will present
23 its rebuttal arguments. And then you will be excused for the
24 day.

25 We'll start tomorrow morning with my instructions to

1 you on the law. And then you may begin your deliberations
2 tomorrow morning after my instructions.

3 Until then, continue to keep an open mind, have no
4 discussions about the case, about any of the arguments you've
5 heard so far. Please your leave your note pads on your chairs.
6 We'll stand in recess for 15 minutes.

7 (Brief Recess.)

8 MR. KURLAND: Your Honor, Mr. Coburn had to leave and
9 he asked the Court's permission if I could, if I can read
10 something that he wrote.

11 THE COURT: Certainly, Mr. Kurland.

12 MR. KURLAND: I'll try to keep it together, too. He
13 handed this to me as he was leaving after my argument.

14 Your Honor, I wanted to let you know, I wanted to let
15 Your Honor know that my Mom died at about 12:30 p.m. today. I
16 hoped I might get down to Texas to see her one last time but it
17 was not to be. My Mom would have been, would have very much
18 wanted me to remain here. She loved watching trials in which I
19 was involved and would have wanted to be sure that I saw this
20 through. I wanted to try to express the depth of my gratitude to
21 the Court for adjourning for a full day so that I could see my
22 Mom conscious and alert before she died. I can't tell the Court
23 what it meant to me to be able to do that. It has been a great
24 honor to be part of this trial before Your Honor.

25 I'm informing, I'm inferring from our prior colloquies

1 that the Court won't mind if I absent myself from the proceedings
2 for a little while now that Mr. Kurland has closed. I don't
3 completely trust myself to speak orally right now so I'll ask
4 Adam if he would be kind enough to read this note to Your Honor.

5 My Mom was not a religious person and won't be having a
6 traditional funeral in the near future so I should be completely
7 available to help cover jury notes and the verdict. Thank you
8 again for, Your Honor, the prosecutors, and my co-defense
9 counsel, for all your kindness and understanding during this
10 difficult moment for me and my family.

11 THE COURT: Thank you very much, Mr. Kurland.

12 Okay. May we have the jury, please? Counsel, Belinda
13 tells me that the jurors have inquired after Mr. Harris. So what
14 I intend to do when they come out is simply to say that Mr.
15 Harris thanks them for any expression of concern and he is doing
16 fine. And of course, I'll comment on Mr. Coburn's absence based
17 on a personal matter.

18 (Jury enters the courtroom.)

19 THE COURT: Good afternoon, ladies and gentlemen.
20 Thank you for your patience.

21 Before we hear from Mr. Harding, two quick things. Mr.
22 Harris expresses his appreciation for your expressions of concern
23 about him. He's doing fine.

24 But you will also notice this Mr. Coburn has had to
25 absent himself on account of a personal matter. So we're

1 continued, we're ready to continue at this time.

2 Mr. Harding, whenever you're ready.

3 MR. HARDING: Thank you very much, Your Honor. Ladies
4 and gentlemen, we're almost done.

5 I too want to thank you on behalf of the United States
6 for the obvious attention and great care that you've taken
7 throughout this trial in listening to the evidence. I haven't
8 objected very often during the defense attorneys' closing
9 arguments. Please don't interpret my silence as agreement with
10 them. I have a lot of points to cover so I'm going to get right
11 to it, if that's all right.

12 Mr. Lawlor said yesterday that the government
13 overreached by putting Nieshia Duganne on the stand. And it had
14 to do with the fact that she testified that when she went in to
15 make the buy from Mr. Mitchell and his associates, actually
16 directly from Sharmika Fletcher, there was a gun on the table.
17 And according to Mr. Lawlor, the police went in two minutes later
18 and they couldn't find a gun.

19 Ladies and gentlemen, if you review your notes on
20 Sergeant Norman Young, as well as Nieshia Duganne, you'll see
21 that it was actually an hour that passed after Nieshia Duganne
22 came out at 8:30 p.m., after making that buy in January of 2000,
23 Sergeant Young went to get a search warrant for the house. And
24 when he returned, they went in through the door around 9:30. By
25 that time Mr. Mitchell was upstairs in a bedroom. The police had

1 to call for him to come down. And it was a little passage of
2 time.

3 And I suggest to you, ladies and gentlemen, that Mr.
4 Mitchell had plenty of time to hide a gun, which is what he would
5 have done if he thought the police were coming in the door.

6 There's no reason to doubt what Nieshia Duganne said
7 because she has no incentive to lie about whether there was a gun
8 on the table or not when she went in to make that buy.

9 Mr. Lawlor questioned Detective Barnes or suggested
10 that he was a nasty guy. Detective Barnes is the person who made
11 the arrest of Mr. Harris when they searched Amity Street. And
12 Mr. Lawlor suggested that he had threatened Harris with arresting
13 Harris's mother and then, even though Harris confessed to having
14 all the drugs that were in the house, and even admitted to
15 selling the drugs in Park Heights, not in that immediate
16 neighborhood, Detective Barnes went ahead and arrested the
17 mother, anyway. Your memory, of course, is what controls here.

18 My recollection of Detective Barnes's testimony is
19 that, yes, indeed, she was arrested. She was taken Downtown. He
20 went Downtown with her, spoke to a prosecutor, and she was
21 released that very night. She didn't spend any time in jail.

22 Mr. Lawlor suggested that the government did something
23 wrong in not calling TM, Tony Montana, Mark Herbert, to the stand
24 to testify. I don't really understand this objection. Mr.
25 Lawlor knows that we didn't believe him. He pointed that out

1 himself.

2 Mr. Montana or Mr. Herbert has always been available to
3 the defense to call in their own case. Only Mr. Lawlor chose to
4 do so. But in fact, as you heard from Mr. Herbert, he has been
5 in touch regularly with Mr. Mitchell and with Mr. Harris, even
6 though they've been locked up. He talks to them on the phone
7 frequently. He corresponds with them. He goes to visit them.
8 He's no secret. And in any event, ladies and gentlemen, Mr.
9 Herbert's grand jury testimony has been available to the defense
10 attorneys in this case since 2005. So they didn't have to wait
11 until two weeks before the end of this trial to try to contact
12 Mr. Herbert and get him to come in and testify.

13 Mr. Lawlor said something about there not being any
14 evidence at all of Mr. Mitchell being involved in a robbery with
15 Mr. Gardner and Mr. Martin back in 1994. What I want to do is
16 simply call your attention to September 23rd, 2008, the redirect
17 of Jaquetta Smith. Perhaps you took notes on this particular
18 item. Perhaps you didn't.

19 My notes show that she, although she denied knowing
20 anything about the drug business that Bo, who is her, the father
21 of her children, anything about their drug business or Wayne's
22 drug business or Goo's drug business, she knew they were all
23 three locked up for doing a robbery together. And that was what
24 Mr. Mitchell's second stint at the Hickey School was all about.

25 Mr. Lawlor said that Mr. Montgomery didn't really know

1 Mr. Mitchell. Actually, Mr. Montgomery knew Mr. Mitchell very
2 well. He wasn't nearly as tight with Mitchell as he was with
3 Gardner and Martin. He considered Gardner and Martin his family.
4 But he, and he didn't include Mitchell in that category. But you
5 remember, he said Mitchell was family to Gardner and Martin.

6 Mr. Montgomery went to New York one time on a
7 drug-related trip with Mr. Mitchell, in which Mitchell drove.
8 And Gardner and Martin were also along. This was in the late
9 '90s. He described that trip up there. Not to be confused with
10 the one Bacon described, where they went up and visited Mr.
11 Mitchell in New York.

12 There were two photo spreads of Mr. Mitchell showing
13 Mr. Mitchell's picture. Mr. Montgomery picked out the right
14 photo in one of them. It's in evidence. It's one of the S
15 exhibits. And he picked out the wrong one in another photo
16 array, which had poor quality photographs in it. We went through
17 that when Mr. Montgomery was on the stand.

18 Mr. Lawlor says that his client is fighting for his
19 life, and I think that perhaps Mr. Kurland just now was trying to
20 evoke the same thoughts in your mind when he was talking about
21 descending into the underworld, the inferno. Ladies and
22 gentlemen, this is not a death penalty case. That is not one of
23 the options.

24 MR. LAWLOR: Objection.

25 THE COURT: The objection's overruled. I will instruct

1 you, ladies and gentlemen of the jury, in my instructions
2 tomorrow that the issue of punishment is entirely a matter for
3 the Court and not at all a matter for the jury's consideration.
4 But this is proper argument. Go ahead, Mr. Harding.

5 MR. HARDING: Okay. Death is off the table in this
6 case, ladies and gentlemen.

7 Mr. Kurland said something just now about sending the
8 case to state court. I'm afraid, ladies and gentlemen, that I
9 have to characterize this as a, as a trick. You are going to
10 have to decide, if you follow the Court's instructions, whether
11 the defendants are guilty or not guilty of the charges in the
12 indictment. There isn't going to be a little box for, well,
13 maybe you should send this back to state court and see if, see if
14 they want to do something with this case. That's not going to be
15 one of your options.

16 And you know from your own common experience and your
17 own common sense that whatever you decide, the state prosecutors
18 aren't going to do anything after you decide. If you decide to
19 convict, they aren't going to do anything because it would be a
20 waste of their time. If you decide to acquit on any count, the
21 state prosecutors aren't going to do anything.

22 MR. LAWLOR: Objection, Your Honor.

23 MR. HARDING: Because a federal jury will have held
24 that they aren't guilty of whatever counts.

25 MR. LAWLOR: Objection.

1 MR. MARTIN: Objection, Your Honor.

2 MR. KURLAND: Objection.

3 THE COURT: This is fair response. But let me say this
4 to you, ladies and gentlemen of the jury. There has been
5 argument to you from the defense side, very strenuous argument,
6 in so many words that this is not a federal case and shouldn't be
7 in federal court, and has suggested to you that this case would
8 be more appropriate in state court. Mr. Harding now is
9 responding to that argument. And what he said to you is a part
10 of his argument. He's not making a prediction and he's not
11 telling you something that he has special knowledge of. He is
12 responding to the arguments you have heard from the defense side.

13 My instruction to you is, one, to follow my
14 instructions. If you find that the government in this case has
15 proven the elements of the offenses against any defendant on any
16 count in this indictment, as I will instruct you in full
17 tomorrow, you should not permit in any way the possibility or the
18 prospect or any speculation about state court matters to
19 influence your decision in any way whatsoever.

20 Likewise, if you are not convinced after full
21 consideration of all the evidence that the government has
22 established all of the elements of the offense beyond a
23 reasonable doubt as to any count or any defendant, you should not
24 hesitate for any reason to find a defendant not guilty of a
25 particular charge, without being influenced in any way over any

1 speculation, seeming prediction, or concern whatsoever about what
2 may or may not happen in state court.

3 We are in federal court. You are a federal jury.
4 These are federal charges. And the rules of the game will be
5 laid out for you in great detail tomorrow in my instructions,
6 which you will have copies of.

7 You may proceed, Mr. Harding.

8 MR. HARDING: Thank you, Your Honor. Ladies and
9 gentlemen, perhaps I should explain that a rebuttal, which I'm
10 doing now, is necessarily disjointed. I'm only permitted to
11 respond to the arguments that defense counsel have made and most
12 of their arguments have come just today. So I've been taking
13 notes and making little mental notes and I am now repeating them
14 to you.

15 But I haven't had the opportunity to organize it all
16 into a perfectly well organized whole. And I also haven't had
17 the opportunity to check exhibits or the evidence or to look
18 things up. So what you're getting is a seat-of-the-pants
19 rebuttal argument, as all rebuttal arguments are. And so I
20 apologize if it's, if it's going to be at all difficult to
21 follow.

22 Mr. Lawlor and Mr. Martin, I think both of them
23 suggested that if you don't find a racketeering enterprise in
24 this case, all or most of the other counts, especially the murder
25 counts, would fail in this case. Actually, that's not true,

1 ladies and gentlemen. The murders are charged as murders in aid
2 of racketeering in some of the first early counts in the
3 indictment. But you'll see that in Counts 11, 13, 14 and 16, you
4 can convict of four of the murders in this case simply based upon
5 the premise that the murder was accomplished in furtherance of
6 the drug conspiracy.

7 Speaking of conspiracy, this is perhaps the principal
8 point the defense attorneys focused on and also the one I'm going
9 to be spending some time on. I think that the problem with the
10 defense understanding of the conspiracy in this case and the RICO
11 enterprise is primarily legal, but it is also factual. And I
12 want to focus first on the factual problems that I think some of
13 the defense attorneys have because I think this will perhaps
14 clarify some things in your minds.

15 The defense attorneys have never fully appreciated that
16 these guys, with the exception of Mr. Harris, these guys have
17 long since become wholesalers in the sense that they didn't stand
18 out on the street and sell to drug addicts. They hadn't been
19 doing that since the mid '90s. They are wholesalers in the sense
20 that they sold to other dealers. They had guys scattered around
21 town in various drug dealing neighborhoods who sold for them.
22 And they made it their business to get supplies and to transfer
23 it to their little dealers in these neighborhoods and collect a
24 sort of commission or a brokerage fee on that transfer. That's
25 what the great bulk of the evidence in this case shows.

1 Mr. Lawlor said yesterday that we never had a shred of
2 evidence that they were wholesalers. Actually, the vast bulk of
3 the evidence in this case has been that they are wholesalers.

4 That doesn't necessarily mean big time dealers. It
5 just means that they sold to other dealers, not to drug addicts.

6 So defense counsel have misunderstood this crew. And
7 they've tried to jam the evidence in this case into their
8 preconceived notion of a hierarchical street organization with
9 lookouts and stash houses and that sort of thing. These guys
10 were a coalition of wholesalers primarily. They relied on one
11 another for the sorts of things that wholesalers need to rely on
12 one another for.

13 They each had their own little operations, their guys
14 working for them. We heard about, primarily from Mr. Montgomery
15 and Mr. Bacon, they knew that Gardner sold crack and heroin both
16 in the Westside Shopping Center and in Park Heights. And both of
17 them described Goo's most important customer as a dealer named
18 Avon, who was Goo's cousin, who lived in Park Heights, but also
19 worked to some extent in the Westside Shopping Center
20 neighborhood down in Southwest Baltimore.

21 You remember that Goo and Bacon also owned that store
22 at McKean and Westwood, where they were selling marijuana out of
23 that store. Mr. Martin sold powder cocaine at the Savoy
24 Apartments in Randallstown and also around the Westside Shopping
25 Center. He had a guy named Xavier, whom we heard about, who sold

1 not only powder cocaine, but crack. He sold crack for Mr. Martin
2 down in Southwest Baltimore.

3 And we also heard that Wayne was selling heroin at
4 times in Southwest Baltimore.

5 Mr. Mitchell had some far flung -- oh, you heard also
6 from, I believe it was Mr. Montgomery or perhaps it was, no, it
7 was Mr. Bacon, that Mr. Gardner had an operation going on up in
8 Pennsylvania. We also know that Mr. Mitchell had that operation
9 going up in Altoona, Pennsylvania. This is just another set of
10 little drug dealers to whom Mr. Mitchell and the others could,
11 could deal. This was their, their customer base.

12 It's just as if, it's no different in terms of the
13 conspiracy than the fact that they had guys operating for them in
14 Catonsville or Randallstown.

15 Don't forget that Mr. Gardner and Mr. Montgomery both
16 had Aaron Holly working for them in Catonsville on Winters Lane.
17 He was selling crack for both of them in Catonsville.

18 These guys also sold to one another. And just to
19 briefly go over this. We heard from Mr. Bacon that, for a time
20 in the 1990's, Wayne, Mr. Martin, was supplying Bo with cocaine.
21 Darryl Wyche, we heard from Natasha Wyche and from Dwayne Denham,
22 was supplying both Goo and Wayne. And we also heard from Natasha
23 Wyche that he was supplying Bo.

24 Darryl Wyche supplied Goo and Wayne back in the 1990's.
25 And as you know, they got arrested and locked up for a couple of

1 years, both of them.

2 We heard from Dwayne Denham that Wayne reconnected with
3 Darryl Wyche after he got out of the halfway house and was
4 getting from him again before Darryl Wyche was killed.

5 Bo's trafficking with Darryl Wyche is virtually
6 continuous from 1997 up until the time of Darryl Wyche's death.
7 In 1997/98, according to Natasha Wyche, Bo could come into that
8 grocery store that she was running with her husband, Darryl, and
9 make drug purchases from Darryl there. And she testified to
10 seeing Bo and her husband interact on a number of occasions in
11 the late '90s and into the early 2000's.

12 She knew that Darryl went up to Altoona once with Bo.
13 Darryl was the source of supply for those drugs up in Altoona
14 that Bo was selling up there. You remember, she described how
15 Darryl was there one time when somebody robbed the house where
16 they were selling drugs in Altoona.

17 Goo, Mr. Gardner, got Will Montgomery started off
18 dealing in Catonsville on Winters Lane. Goo fronted Will
19 Montgomery ounces of crack, he told us. An ounce is 28 grams.
20 And Will would pay 800 to \$850 an ounce for that. And then, as I
21 just said, both of them started supplying Mr. Holly at the same
22 location. And we heard that Holly was making about \$200 a day
23 from each of their supplies of crack that they gave to him.

24 We heard that Mr. Martin fronted crack pills to Will
25 Montgomery on one occasion. We heard that, in addition to

1 selling for Will in Catonsville, Mr. Holly sold down in the
2 Edmondson Avenue area. He sold heroin for Will Montgomery.

3 We heard that Bo supplied Mr. Harris, of course. We
4 heard that from Mr. Hayes. He supplied Mr. Harris with crack
5 that he sold on Woodland Avenue, and also TM.

6 We heard that Bacon and Goo cooperated closely in a
7 number of things. They not only sold marijuana together out of
8 that store front, they cooked up their cocaine into crack
9 together at the Winchester Apartments and also at a house on
10 Johnnycake Lane.

11 We heard that Wayne supplied Darryl Bacon for a few
12 months. Mr. Pyne this morning for some reason suggested that Mr.
13 Bacon didn't have any drugs information about his client, Mr.
14 Martin. But he then went on, Mr. Pyne did, to recite some of the
15 examples of how they had gone up to New York together to do drug
16 business. And the evidence is clear from Bacon's testimony and
17 other evidence that we've heard, including the arrest on I-95,
18 above all, that Wayne was heavily involved in drug trafficking
19 and going to New York with his coconspirators, Mr. Bacon and Mr.
20 Montgomery and others, including Mr. Mitchell.

21 Remember the letter from, from Mr. Bacon to Mr. Martin.
22 It was written on March 4th, 2002. It's Government Exhibit
23 W-5-I. He says, when I get out, I hope I can come to my dogs and
24 get an eight with no problem. He explained that that meant an
25 eighth of a kilo, with no problem. He's looking to get supplied

1 as soon as he gets out of jail. And this is from Mr. Martin, who
2 at this very time is telephoning Darryl Wyche, is not yet out of
3 the halfway house.

4 Remember, he told Mr. Reynolds when he was still in the
5 halfway house that he would do anything to get money. And
6 Reynolds understood that to mean he would do anything to get
7 established again in the drug business.

8 We also hear in this letter about how Mr. Bacon wants
9 to ski mask it up and is ready to engage in robberies again with
10 Mr. Martin and the others.

11 So ladies and gentlemen, this is a coalition of
12 wholesalers that supplied one another, that were available to
13 supply one another when they needed to, that could hook one
14 another up to other suppliers, including Darryl Wyche, but also
15 all those guys in New York like Poppi and Polo in Columbia. We
16 heard from Mr. Bacon about how he and Gardner and Martin went out
17 there and bought a kilo of cocaine from Polo in Columbia.

18 They traded guns. They committed robberies and murders
19 together. They pooled their money sometimes when they were
20 making drug purchases. They might buy for one another. We heard
21 that Goo would buy sometimes for Mr. Martin up in New York.

22 They sometimes sold together, as we heard about from,
23 Goo and Martin were arrested twice together in this case. We
24 heard that Goo and Mr. Bacon were selling marijuana out of that
25 store front.

1 So they would do all sorts of drug business, firearms
2 business, robbery business, protection business, all of that
3 together. And ladies and gentlemen, the fact that we don't have
4 very many beefs identified in this case doesn't begin to describe
5 the importance of mutual protection that these guys provided to
6 one another. They needed mutual protection like we need the air
7 we breathe. A drug dealer won't survive for a week on the
8 streets unless people know that there would be repercussions for
9 robbing that guy or killing that guy. And people had to know
10 that each one of these guys had a crew behind him who would be
11 ready to retaliate. That's what Mr. Montgomery meant by family
12 and that's what these guys provided to one another.

13 Throughout most of their history these guys didn't have
14 a permanent leader or a hierarchy of relationships between one
15 another. They instead gathered together in various combinations
16 for particular projects, going to New York, robbing somebody.
17 And in the course of those projects, a leader might emerge for
18 that project, that operation. I think it's fair to say that Mr.
19 Mitchell was the leader of both of the double murders that we
20 heard about in this case, the McCaffity/Brown murder and the
21 Wyche brothers murder.

22 I would also emphasize that Mr. Martin was a leader of
23 the Goose operation. You remember that it was his idea. And
24 when he got arrested, Montgomery and Holly dropped the whole, and
25 Gardner dropped the whole thing and moved on to another plan.

1 Why? Because it was Mr. Martin's gig.

2 As for the Tonya Jones Spence murder, that operation
3 required a leader, also. And even though it was Montgomery's
4 idea in the beginning, ladies and gentlemen, I suggest to you
5 that the leader of that operation was Mr. Gardner. He's the one
6 who, when he got out of jail -- remember, he was locked up
7 briefly the same time that Mr. Martin was. He was locked up for
8 a parole violation. And when he got out he needed money. He
9 came and talked to Montgomery about how he need money.

10 And they dropped the Goose plan because Martin was
11 locked up. And they really went to town on the Darius Spence
12 robbery plan. And it was Goo that supplied the guns for that
13 operation, that drove out there every day for those surveillances
14 that lasted one to two months. It was in his car that they went
15 every day. It was Goo that was pushing things every single day
16 to get things done. He bought all the equipment. He bought the
17 duct tape and the latex gloves and all that stuff.

18 And when the day came, when June 7th rolled around, it
19 was Goo that was finally so impatient that they weren't that day
20 going to wait for Darius to show up any more. They would go
21 ahead and do the robbery regardless of whether Darius showed up.
22 Goo made all those decisions. He became the operational leader.

23 Nevertheless, there's no permanent leader or hierarchy.
24 Ladies and gentlemen, this is where we get into the legal aspect
25 of all this. Conspiracies do not require leaders or hierarchies.

1 They don't require any organization at all.

2 The judge is going to instruct you that a conspiracy is
3 an agreement between at least two people to do something the law
4 forbids. That's what a conspiracy is.

5 An enterprise is a little more complicated because it
6 requires at least an informal organization. But that's precisely
7 what these guys had. They had continuous relationships where
8 they could rely on one another for certain kinds of things and
9 certain patterns and predictable ways they operated. And they
10 were organized in that way. They would go out and rob other drug
11 dealers together. They would go to New York together. They
12 would hook up to do all the various things that we've heard about
13 so many times in this case. That's their informal organization.

14 Let me speak a little bit more about the square peg in
15 the round hole argument because I have to say that I think what
16 defense counsel have done in this case is to try to create a
17 false round hole that we can't fit this evidence into.

18 The law of conspiracy and of the RICO enterprise is
19 very different from what defense counsel have suggested to you.
20 Ms. Rhodes in her opening complained that there were no regular
21 meetings or dues or officers in this organization. This is, this
22 is all quite ridiculous. Mr. Crowe complained that there was no
23 bank accounts. These are not things the judge is going to
24 instruct you that you have to find in order to find a conspiracy
25 or a RICO enterprise.

1 Mr. Lawlor, let me start with a mistake Mr. Lawlor made
2 yesterday. He said that each of these defendants is responsible
3 only for his own conduct. Let me read you what -- the judge is
4 going to explain the legal principles to you tomorrow. One of
5 them will be that the reasonably foreseeable acts, declarations,
6 statements and omissions of any member of the conspiracy and in
7 furtherance of the common purpose of the conspiracy are deemed
8 under law to be the acts of all the members and all of the
9 members are responsible for such acts, declarations, statements,
10 and omissions.

11 That's what conspiracies are all about, ladies and
12 gentlemen -- shared responsibility for shared conduct.

13 And let me give you a particular illustration of this
14 because when you get back into the jury room, one of the things
15 you'll be asked to do on the verdict sheet is to indicate, first
16 of all, whether you believe any of the defendants are guilty of
17 the narcotics charges in the indictment; secondly, to determine
18 what narcotics; and thirdly, to give a crude estimate of the
19 weight of the narcotics each one is responsible for.

20 The judge is going to instruct you tomorrow first that,
21 of course, a defendant is accountable for any drugs that he or
22 she personally distributed or possessed with the intent to
23 distribute. But a defendant is also accountable for any type and
24 quantity of drugs which another member of the conspiracy
25 distributed or possessed with intent to distribute as part of the

1 conspiracy so long as it was reasonably foreseeable to the
2 defendant that such a type and quantity of drugs would be
3 involved in the conspiracy which he joined.

4 Ladies and gentlemen, there's been a lot of testimony
5 about quantities in this case, but it's going to be much simpler
6 if you recall that instruction tomorrow. Each defendant is
7 responsible for all of the drugs that he can reasonably foresee
8 in the whole conspiracy.

9 Will Montgomery told us that Wayne and Goo and
10 sometimes Darryl Bacon pooled their money to buy whole kilos of
11 cocaine up in New York, although Will was never along when they
12 bought more than a half a kilo. He also knew, Mr. Montgomery
13 did, that Bo pooled his money with Wayne and Goo to get drugs in
14 New York between 1997 and 2000, even though he was only present
15 for one of the trips when Bo was actually there.

16 What wonderful corroboration we have for that when
17 Sergeant Wooden testified that Gardner told him in 1999, when
18 Gardner was arrested on I-95, that he sold a kilo of cocaine per
19 week. And he didn't specify, according to Sergeant Wooden,
20 whether it was crack or powder cocaine.

21 We heard from Dwayne Denham, who has no incentive to
22 mislead us about this, that Darryl Wyche sold ten kilograms of
23 cocaine per week.

24 We heard from Mr. Reynolds that in the mid 1990's, when
25 Wayne and, Wayne was working for him and Goo was working for NA,

1 this sort of affiliated shop nearby, Reynolds testified that he
2 made between 10 and \$17,000 a day and he sold 500 grams of cut
3 heroin per week.

4 Okay. Shared responsibility. Another complaint that
5 we heard about from defense counsel is that this crew of guys,
6 including not just these defendants, but the other core members
7 who are not defendants, Darryl Bacon, Will Montgomery, Aaron
8 Holly, Darryl Wyche, they aren't tight enough or sophisticated
9 enough or successful enough to be a conspiracy or an enterprise.

10 Ladies and gentlemen, none of this is required. None
11 of this, the judge is going to instruct you, you have to find in
12 order to find either a conspiracy or an enterprise.

13 The judge is going to tell you that a conspiracy is
14 just an agreement between two or more people to do something
15 unlawful. No organization is required. Same thing for a RICO
16 enterprise, except that it can be just a group of people of no
17 particular size or success, and they can be organized only
18 informally, the way many drug crews are organized. Informally.

19 Mr. Lawlor said that RICO is a statute -- and we heard
20 this from other defense attorneys, too -- RICO is a statute that
21 was used against the Mafia, which is, of course, quite true. But
22 you also know from your common experience and from your common
23 sense that it is routinely applied much more frequently to
24 narcotics organizations, the way it's being done in this case.
25 There's nothing unusual or peculiar about this prosecution.

1 It's useful when the defendants are accused of various
2 crimes, as these defendants are. They're accused of narcotics
3 and robbery and murder, other crimes. That's why RICO is
4 valuable.

5 Now, Mr. Lawlor said that the evidence that these
6 defendants did robberies together is zero. I'm just going to,
7 I'm just going to leave that go because I think we heard about a
8 great many robberies that these guys did together.

9 Mr. Pyne said this morning, he referred to the four
10 defendants here as the core group. Please don't make that
11 mistake. The core group is not just these four defendants. It
12 also includes these other guys that I just named for you. The
13 common purpose that they shared was drug dealing and robbery, and
14 murder when need be. All the purposes that are listed in the
15 indictment. You will see there's a section in Count One listing
16 the purposes of this crew.

17 Mr. Pyne said this morning that there's no evidence
18 that Mr. Martin had anything to do with drugs after he got locked
19 up in 1999. Not true, ladies and gentlemen. We learned from Mr.
20 Denham that he started getting supplied again by Darryl Wyche
21 before Wyche was killed. The Wyche robbery itself, the Wyche
22 brothers' robbery and murder was drug-related because they got
23 and expected to get drugs when they robbed Darryl Wyche. They
24 knew what he was going to have in his book bag. There was an
25 appointment set up with Bo to do a drug deal. So they knew that

1 in the book bag there would be drugs.

2 And importantly, ladies and gentlemen, none of these
3 guys knew about the fact that Darryl was going down to Washington
4 earlier that evening. So they didn't have any reason to suspect
5 there would be more drugs in the car and they didn't look for the
6 other drugs in the car for that reason. They left a brick of
7 cocaine in the trunk, as we heard.

8 We heard that Mr. Martin was eager to get back into
9 drugs from Mr. Reynolds, when he was still locked up in the
10 halfway house. We saw Mr. Bacon's letter. In any event, I'll
11 get to this in a minute, there's no requirement that the
12 government produce evidence of Mr. Martin's drug trafficking
13 after 1999 in order for him to be held accountable for the drug
14 trafficking and the conspiracy after 1999. And I'll get to that
15 when I talk about withdrawal in a moment.

16 Mr. Pyne inadvertently said this morning, I think, that
17 Martin, quote, "has to have known of two racketeering acts that
18 were going to be committed as part of the enterprise." What the
19 judge will tell you tomorrow morning is, for the purposes of
20 Count One the government must prove that at least two of the nine
21 racketeering acts alleged in Count One were or were intended to
22 be committed as part of the conspiracy, although it need not
23 prove that any defendant committed or agreed to commit any of
24 these acts as long as the government proves that the defendant
25 participated in some manner in the achievement of the overall

1 objectives of the conspiracy.

2 I'm calling these discrepancies to your attention
3 because I want you to pay very careful attention to the jury
4 instructions tomorrow in light of the arguments you've heard from
5 defense counsel.

6 Mr. Lawlor and Mr. Pyne this morning, perhaps other
7 defense attorneys, have contrasted this crew with the Rice
8 organization, which they think was a real RICO enterprise.
9 Actually, the Rice organization was like this one, a coalition of
10 wholesalers who had their own dealers working for them
11 independently, each one separate from the other. And so they
12 didn't really have a leader, either.

13 Here's what Mr. Golder said. Remember Travis Golder,
14 when he was being cross examined by Ms. Rhodes?

15 Okay. And the Rice brothers themselves, were they kind
16 of in charge? Answer: Actually, it wasn't really -- no.

17 Question from Ms. Rhodes: Who was in charge? Answer:
18 Really wasn't nobody in charge. Everybody worked together.

19 Mr. Golder and Mr. Clash also said that they didn't
20 even know some of the other guys who were in the indictments with
21 them. Both of them didn't even know some of the other people.

22 Mr. Golder said, I had my own group of people outside
23 the bubble. That's his crew of dealers that he sold to, just
24 like these guys had their Avons and their Xaviers and their, and
25 such people scattered around town.

1 The Rice crew, according to Mr. Golder, was, quote, "a
2 bunch of friends who just hung together getting a couple of
3 dollars", unquote. Everybody did their own thing. I mean, we
4 all run together. We all got money together. But we also had
5 other things that we did outside of ourselves. He completely
6 denied that there was any leader or organization in the sort of
7 hierarchical sense.

8 So the Rice RICO enterprise, although those guys were
9 making more money than these defendants were, was no different in
10 its organization than this crew was.

11 Now, I told you I was going to talk about dropping out
12 and withdrawal. Mr. Harris, you know, joins up with this
13 organization in 2000 or the beginning of 2001, at a time when
14 Gardner, Martin, Montgomery and Bacon are all locked up. And
15 that means, among other things, that Montgomery and Bacon didn't
16 even know him. And by July of 2002, everybody in the core group
17 of this enterprise was either locked up or dead.

18 The judge is going to instruct you tomorrow that
19 getting arrested does not mean the conspiracy is over or even
20 that the person who got arrested is out of the conspiracy.
21 Instead, he's going to say, once a person joins a conspiracy that
22 person remains a member until he withdraws from it. Any
23 withdrawal must be complete and it must be done in good faith. A
24 defendant must have demonstrated some positive action which
25 disavowed or defeated the purpose of the conspiracy. In the

1 absence of definite proof, withdrawal from or abandonment of the
2 conspiracy should not be presumed merely because a defendant has
3 been arrested or becomes incarcerated. A defendant's membership
4 in a conspiracy is presumed to continue until he withdraws from
5 the conspiracy by affirmative action.

6 Did these defendants ever take affirmative action to
7 defeat the conspiracy? Well, we don't have a shred of evidence
8 that they did any of that except, of course, from Mr. Montgomery
9 and Mr. Bacon, who came in here and testified against their
10 coconspirators.

11 What did the others do? After they were locked up in
12 2002, Mitchell and Harris recruited Chris Dobropolski to be a
13 member of their crew, to crack spines for them outside when they
14 got their drug operation started up again.

15 Mr. Harris actually did get out of jail for a few
16 months at the end of 2003 and at the start of 2004, you remember.
17 That's when he was planning robberies with Chris Dobropolski.
18 And that's when he got arrested with that .45 caliber
19 semiautomatic that he wasn't allowed to possess as a felon.

20 We learned that during this period when he was locked
21 up, Mitchell put out a hit on Claudus Lassiter. Claudus Lassiter
22 we heard about from Mr. Bacon because he knew that Gardner and
23 Martin thought that Claudus Lassiter was responsible for putting
24 their names into the Wyche murder. We heard about him from
25 Rodney Hayes, of course.

1 We also heard about Claudus from Mr. Martin. Martin,
2 in his statement to Detective Niedermeier, talked about how
3 Claudus approached him and asked him if he had something to do
4 with the Wyche brothers murder. So it's wonderful corroboration
5 for Bacon and for Rodney Hayes that Mr. Martin himself pinpoints
6 Lassiter as a potential snitch, as would he put it.

7 We learned about the courtroom demonstrations that
8 started up in 2005 and were still carrying on into this year.
9 This was obviously highly orchestrated activity to disrupt the
10 court proceedings and it forced hearing after hearing to be
11 continued. Testimony had to be suspended.

12 We heard about the Stop Snitching video earlier this
13 year, where the defendants put the names of three grand jury
14 witnesses out there -- Mr. Bacon, Mr. Montgomery, and they
15 thought at that time Tony Herbert, Mr. Tony Montana was
16 cooperating, as you heard.

17 You want continuity, ladies and gentlemen? You have to
18 find continuity in a RICO enterprise. Ladies and gentlemen,
19 three of these defendants have been operating together, working
20 together ever since middle school. Mr. Mitchell -- they're now
21 in their thirties, their low thirties. Mr. Mitchell, Mr. Martin
22 and Mr. Gardner. Yes, they've been locked up from time to time.
23 That doesn't make any difference. The law presumes that the
24 conspiracy continues. Even the newcomer to this group, Mr.
25 Harris, has been part of this crew for six years now.

1 Mr. Kurland and several other attorneys, by the way,
2 misunderstood the time period of the drug conspiracy in this
3 case. The RICO conspiracy stops in 2006. You'll see when you
4 look at the indictment, the drug conspiracy stops in 2004 because
5 that's when Harris got locked up for the last time and that's
6 when they stopped being able to engage in narcotics trafficking.

7 If anything, though, the indictment minimizes the
8 longevity and continuity of this group. The evidence is that
9 this group is still operating today. This group has been
10 operating together into this year in the courtroom
11 demonstrations. We saw pro se pleadings that were filed during
12 this trial. The pro se pleadings, by the way, are not
13 obstruction of justice. They are evidence of the continuing,
14 concerted action of these defendants. But by themselves, they do
15 not disrupt the court or prevent it from operating.

16 Nor does Bo's going off to college to play football in
17 the late 1990's constitute withdrawal from the conspiracy. We
18 heard about the robberies. We heard about his drug trafficking
19 with Darryl Wyche from 1997 on. He never withdrew from the
20 conspiracy. He never took decisive action to defeat the
21 conspiracy.

22 Let me say a word or two about multiple conspiracies.
23 Of course, there are more than one conspiracy that you've heard
24 about in this case. Count Three is a conspiracy, a conspiracy to
25 murder Oliver McCaffity. Count Eight is a narcotics conspiracy.

1 What you have to find in this case, ladies and
2 gentlemen, is an overall agreement and an informal association.
3 You may find that there was a single overall conspiracy despite
4 changes in personnel by the termination, withdrawal, or additions
5 of new members or activities or both so long as you find that
6 some of the coconspirators continued to act for the duration of
7 the conspiracy for the purposes charged in the indictment. The
8 fact that the members of the conspiracy are not always identical
9 does not necessarily imply that separate conspiracies exist.

10 The Pennsylvania conspiracy that Mr. Martin this
11 morning said was separate was not at all separate. The other
12 core members, many of them were locked up at the time, but that
13 doesn't terminate the conspiracy. Only defeat, acting to defeat
14 the conspiracy terminates the conspiracy or their involvement in
15 the conspiracy.

16 In any case, the source of supply for Mr. Mitchell's
17 drugs at that point, remember, he was dealing up there in the
18 late '90s and arrested in January of 2000, his source of supply
19 was Darryl Wyche. We know about that from Natasha Wyche. We
20 know that Darryl even went up there to Altoona with Mr. Mitchell.

21 There was nothing separate about any of the separate
22 conspiracies that Mr. Martin identified this morning. They're
23 all part of the overall conspiracy and no one ever withdrew. No
24 one ever withdrew in the legal definition that the judge gave
25 you. So this conspiracy continued.

1 Mr. Kurland had some remarks about multiple
2 conspiracies this afternoon. And he made the point that Brian
3 Klas, Agent Klas, called this the Mitchell organization. You
4 recall that Agent Klas testified that in an early report, he
5 called it that just because Mr. Mitchell's name appeared first on
6 the indictment.

7 Ladies and gentlemen, that chart that the government
8 had that had the suppliers on top and the members of this crew on
9 the bottom, all of those people are legally members of the same
10 conspiracy. All suppliers, all people in the red box at the
11 bottom, all of them together are in the conspiracy. It's not
12 just the people in the red box.

13 Mr. Kurland suggested that morning that Wyche could not
14 have been a member of the conspiracy -- actually, it was this
15 afternoon -- Wyche could not have been a member of this
16 conspiracy because the conspiracy planned to kill him. And
17 eventually, of course, that's quite true. But ladies and
18 gentlemen, Mr. Kurland flashed up a chart of the Corleone crime
19 family and talked about Tony Soprano.

20 MR. KURLAND: No, I did not.

21 THE COURT: Actually, he didn't use it. He mentioned
22 the Sopranos.

23 MR. KURLAND: I did not.

24 THE COURT: One of counsel mentioned the Sopranos. I
25 think it was Mr., whoever it was.

1 MR. HARDING: Thank you, Your Honor. The point is that
2 those big organizations, those big criminal organizations that
3 defense attorneys are so impressed by kill their members all the
4 time. That's one of their favorite pastimes. And they do it in
5 furtherance of the enterprise because they're trying to get rid
6 of somebody who's weak or somebody who's cheated the organization
7 or whatever. There's nothing inconsistent about a conspiracy or
8 a RICO enterprise killing one of its members.

9 Mr. Lawlor said yesterday, getting to the
10 McCaffity/Brown murders, that the Hammerjacks thing was a big fat
11 theory with no evidence supporting it. And I wondered at that
12 point whether he was here when Jaquetta Smith testified. But he
13 was because he went on to acknowledge that Mr. Mitchell told her
14 that Woody had taken out the contract on his life. And the point
15 that seemed to impress Mr. Lawlor was that we don't have evidence
16 that that's true. We don't have evidence that Mr. McCaffity did,
17 in fact, take out a contract to kill Bo. And I pointed that out
18 in my opening. I don't think that when Bo met McCaffity that
19 night that McCaffity had any intention of killing anybody because
20 he had his girlfriend with him and he was riding around in Hasim
21 Rahman's car.

22 But ladies and gentlemen, what matters is Bo's
23 motivation. He thought that McCaffity was going to kill him.
24 That's what makes this a sort of preemptive strike. And that's
25 why, when Harris pulled the trigger on Mr. McCaffity and Lisa

1 Brown, he was acting to protect his boss, the guy he calls his
2 general in the rap songs, and his source of drug supply. And
3 this is certainly an act in furtherance of the racketeering
4 enterprise and the drug conspiracy.

5 We also know from Eric Clash and from Travis Golder
6 that there were lots of rumors about a contract on Bo circulating
7 around town after the Hammerjacks things. And don't forget that
8 Wayne and Goo actually took the trouble to drive out to see Mr.
9 Bacon where he was locked up and to tell him about the fact that
10 there was a contract out on Bo.

11 For both the double murders in this case, ladies and
12 gentlemen, Mr. Lawlor pooh-pooh's the telephone toll analysis,
13 saying they were just calls between friends. But there's a lot
14 more than that, ladies and gentlemen. Mr. Mitchell communicated
15 repeatedly with the victims of the double murders on the nights
16 they were killed, right up until the very moment they were
17 killed. The last person that Oliver McCaffity ever called in his
18 life and the last person that Darryl Wyche ever called in his
19 life was Mr. Mitchell.

20 And when you consider the significance of the telephone
21 toll evidence in this case, as I'm sure you will, don't forget
22 the cell site information on the McCaffity/Brown murder. That
23 cell site information put Mr. Mitchell, when he was calling on
24 that 5811 telephone, right in the neighborhood where the murder
25 occurred. He was right there in the vicinity, directing Mr.

1 McCaffity where to go as he was circling around, we learn from
2 Jason Elders' map based on the GPS device, as he was circling
3 around Edgecombe Circle, looking for the meeting spot that Mr.
4 Mitchell was directing him to.

5 And for the Wyche double murders, don't just look at
6 the toll information by itself. Don't forget that Mr. Mitchell,
7 when he was interviewed by Detective Niedermeier, admitted that
8 he was using his phone to lure Darryl Wyche into a meeting, a
9 meeting on the corner, near the corner of Ridgewood and the
10 street this side of the tracks, meaning East Wabash Avenue, the
11 exact location of the murder.

12 Mr. Mitchell admitted that he was using his phone
13 repeatedly to set that up. And he admitted even that L was the
14 guy who must have killed him. He denied knowing that L was going
15 to kill them but he admitted the whole modus operandi that the
16 telephone toll information illustrates in this case.

17 Let's go to the Wyche murder, double murder. Mr.
18 Lawlor notes that Jaquetta Smith testified, you remember she was,
19 in the first week of trial she came in and she was not at all
20 happy to be here. She's the baby's mother for Mr. Mitchell
21 children. She didn't want to be here at all. But she said she
22 was home the night of that murder and she went to bed at 11:00
23 and therefore had no idea what Mr. Mitchell did after that. In
24 other words, she opted out of being an alibi witness because the
25 Wyche brothers were murdered over an hour and half later than 11

1 o'clock.

2 Mr. Lawlor then reverted yesterday to the Deezo-did-it
3 claim that we first heard about when Ms. Rhodes gave her opening
4 statement. Now, Mr. Hanlon gave a bunch of reasons yesterday why
5 it couldn't have been Deezo who did that murder. But he didn't
6 mention one reason that occurred to me when Ms. Rhodes was
7 talking in her opening. I wanted to grab her and shake her and
8 say, don't you see, Ms. Rhodes, this Deezo-did-it theory is
9 completely inconsistent with what your own client says happened
10 that night.

11 Mr. Mitchell told Niedermeier that this was set up as a
12 drug deal in which he lured Darryl Wyche to meet with a guy named
13 L who is a Park Heights drug dealer, who sells drugs out on the
14 corner of St. Ambrose and Reisterstown Road, according to Mr.
15 Mitchell. L is not Deezo. There's no way of reconciling Mr.
16 Mitchell's account with the Deezo-did-it theory.

17 And so what Mr. Lawlor and Ms. Rhodes have presented to
18 you is an effort to frame somebody who, according to Mr.
19 Mitchell's explanation of that evening, couldn't possibly have
20 been involved in this crime.

21 Remember, also, ladies and gentlemen, that Bo talked on
22 that tape recorded statement to Detective Niedermeier about how
23 he needed to call Darryl back after the deal actually came down,
24 in order to get his cut. Well, he talked to Darryl several times
25 that night but after Darryl died, he never called Darryl back.

1 We learned that Mr. Mitchell later claimed, and he
2 claimed this in the Niedermeier statement, that he was watching a
3 Rick Fox movie as he was guiding Darryl Wyche to this fatal
4 meeting. This is impossible, ladies and gentlemen, because the
5 Rick Fox movie started at 1:30, according to the TV Guide we got
6 admitted into evidence yesterday, an hour after the murder.

7 So Bo was not watching a Rick Fox movie. He was riding
8 in a car. And he and his coconspirators were going through the
9 book bag that they knew, because they knew Darryl Wyche very
10 well, they knew that Darryl always carried his drugs and his
11 money and his scales in his book bag. And that's all they
12 bothered to take out of the car that night. And they were going
13 down to Druid Hill Park to get rid of the gun they used in the
14 murder perhaps or other evidence that would tie them to the
15 murder.

16 And they were expressing remorse on the way about not
17 having gone through the pockets of the Wyche brothers. They
18 could have maybe gotten more had they done that. It's quite
19 clear what their motive was in doing that crime.

20 Remember, Mr. Mitchell was suddenly arrested on April
21 1st carrying the phone that was used to set up the Wyche brothers
22 murder. So how could he remember a movie that he was watching on
23 April 17th when he was questioned by Detective Niedermeier? He
24 had two and a half weeks to sit there and think about what he was
25 going to tell the police when they questioned him about the Wyche

1 brothers murder after he was connected to the murder by the, by
2 virtue of his telephone. And he came in to Niedermeier's
3 interview with a whole set story. He was eager to tell it,
4 couldn't wait to get it out. And he came up with this Rick Fox
5 movie thing by checking some movie page in a newspaper or some
6 old issue of TV Guide or getting someone to look it up. Only he
7 couldn't remember what time the murder happened. That's why he
8 came up with a bad alibi, as Mr. Lawlor put it yesterday.

9 One thing about Natasha Wyche on the Wyche brothers
10 murder. We heard from Mr. Lawlor that she identified Martin as
11 using the word "Shorty" in that voice mail conversation. And we
12 heard from Mr. Hayes that he identified the word "Shorty" being
13 used both by Mr. Mitchell and Mr. Harris.

14 I call your attention to, at Tab Nine in the transcript
15 book. You're going to -- actually, the tape is what is in
16 evidence. There are five uses of the word "Shorty" in that tape.
17 Two of them Mr. Hayes was completely unable to identify. Mr.
18 Hayes doesn't know Mr. Martin very well. He attributed two of
19 the uses of the word "Shorty" to Mr. Harris and one to Mr.
20 Mitchell, and two he wasn't able to identify at all.

21 I suggest to you that Natasha Wyche, when she
22 identified Martin saying the word "Shorty", was talking about one
23 of those two uses or both of them.

24 Why would Mr. Mitchell kill his own connect? Well, it
25 was to make a big score. One of the advantages of having various

1 sources of supply is that any one drug source becomes expendable.
2 Mr. Mitchell and his colleagues decided they needed a lot of
3 money quick and they decided to kill their old friend, Darryl
4 Wyche. That's all that this amounted to.

5 They were going to do the same thing with Goose. You
6 remember Goose was actually the employer for Mr. Martin. He ran
7 County Sports. Mr. Martin needed a job when he got out of jail
8 and Goose gave him at least a nominal job at that sports store.

9 Why kill people who you're close to? Mr. Mitchell was
10 close to Mr. McCaffity, also. One reason is, ladies and
11 gentlemen, as I said in opening, it's easy to kill people you're
12 close to. It's very easy to carry those crimes out because you
13 can get private with them very easily. They aren't going to
14 suspect that you might kill them. And that's part of the reason
15 why Darryl Wyche and Anthony Wyche became targets in this case.

16 Mr. Martin wants to know, and I think Mr. Lawlor did,
17 too, why would Bo call Amity Street after that murder at the
18 Wyche brothers? You remember at the end, he said, "I'm calling
19 your house, Shorty." He's talking to somebody in the car.
20 Ladies and gentlemen, we don't have any evidence before us that
21 anything else was said. That's because Mr. Martin and Mr.
22 Flannery didn't put a witness on the stand to testify about the
23 tape recorded voice mail conversation. They simply played it
24 again in open court with a transcript and a transcript is not
25 evidence. They made up the transcript themselves. That's not

1 evidence. So you don't have any evidence before you of any other
2 interpretation than the one that Rodney Hayes confirmed and that
3 Detective Niedermeier and Detective Benson confirmed.

4 That last sentence on that tape, which they listened to
5 dozens of times with earphones and everything else, was, "I'm
6 calling your house, Shorty." And Mr. Martin and Mr. Flannery
7 don't have any evidence at all to counter that.

8 I don't know why he was calling Mr. Harris's house. I
9 don't know who was at Mr. Harris's house. I don't know whether
10 he was calling to check to see if anyone was there so they could
11 stop there on their way to Druid Hill Park, or just what the
12 motive was. I do know that this crime had the exact same MO as
13 the McCaffity/Brown murder where Shelton Harris's palm print was
14 found on the door window. The two crimes are identical crimes.

15 I do know that Mr. Mitchell and Mr. Harris were
16 inseparable. Mr. Mitchell wouldn't have dreamed of carrying out
17 another drug-related robbery a few weeks after the
18 McCaffity/Brown murder without Mr. Harris being at his side.

19 And I know from Mr. Hayes's testimony that Shelton
20 Harris's voice is on that voice mail.

21 Mr. Martin says there was no drug motive in the Wyche
22 brothers murder because they left the drugs in the car. Ladies
23 and gentlemen, they took the book bag because that's where they
24 knew Darryl kept his drugs. They didn't know about the drugs in
25 the trunk. They didn't know about Darryl's trip down to

1 Washington earlier that night. And they very much regretted not
2 going through the Wyche brothers' pockets, as I said earlier.

3 This was a drug-related robbery, motivated by the
4 desire for money and the desire for drugs. Some things, ladies
5 and gentlemen, are very simple. That's what this crime was.

6 So it's part of the narcotics trafficking part of this
7 case and it's also part of the robbery part of this case.

8 A bit more about the evidence of Martin and Gardner's
9 involvement in the Wyche brothers' murder. We've heard ad
10 nauseam about "Shit, Wayne", the phrase that appears in the voice
11 mail tape. We heard from the fact, we've heard that Natasha and
12 Denham identified Martin's voice not with certainty on the voice
13 mail tape. Your recollection is what recalls.

14 Bacon could not identify any of the voices on the voice
15 mail tape. He did not say that Wayne's voice was not on the
16 tape. He said he could not identify the voices on the tape.

17 The pattern of calls before the murder is consistent
18 with Bo mobilizing his men to do a joint operation. I'm not
19 going to go through all those calls again. You've heard about
20 them many times now.

21 But here's the evidence that we didn't hear much about
22 today, especially from Mr. Pyne. Montgomery's account of what
23 Gardner told him after the arrest of Mr. Mitchell and Mr. Martin
24 on, Mr. Martin was arrested on April 17th. This evidence is
25 dynamite, ladies and gentlemen, and I'll tell you why, no matter

1 what you think of Mr. Montgomery. And he certainly is, as Mr.
2 Crowe says, a stone cold killer. Whatever you think of him, this
3 evidence is dynamite.

4 Mr. Montgomery said that Gardner told him they had
5 fabricated an alibi, Martin had fabricated an alibi by paying for
6 a movie with a credit card to create a paper trail. This is Mr.
7 Montgomery's testimony. How could anybody make that up? That's
8 impossible for somebody to make up. And it's true. We know that
9 became Mr. Martin's alibi.

10 And ask yourselves next, then, why would somebody
11 create an alibi unless he had something to hide? Ladies and
12 gentlemen, the judge will instruct you that if you find that an
13 alibi was fabricated in this case, that's evidence of guilt.
14 That's evidence that Mr. Martin was involved in this crime.

15 And Gardner is telling Mr. Montgomery all this to sort
16 of put him at ease, to make him feel comfortable with the idea
17 that Martin is going to get out of jail soon and will be able to
18 resume his activities with them in robbing Goose and robbing
19 Darius Spence.

20 Gardner blamed Bo for getting them into trouble by
21 pushing the wrong button on Darryl's cell phone and transmitting
22 a voice mail. How could, how could Montgomery make that up?

23 And then, you remember, Gardner complained -- and this
24 is something Mr. Pyne did mention this morning -- he complained
25 that the voice on the voice mail said, and this was according to

1 what Gardner told Montgomery, this was Bo talking, Why didn't you
2 check their pockets, Wayne? Now, of course, that's not exactly
3 where Wayne gets mentioned in the conversation. It's "Shit,
4 Wayne", is where it actually gets mentioned.

5 And Gardner complained to Montgomery that, actually, it
6 wasn't "Wayne", it was "man." Why would Montgomery make up
7 something like that? That's, if anything, helpful to Mr. Martin,
8 so helpful that Mr. Pyne actually mentioned it this morning. But
9 what it does is corroborate the truthfulness of Montgomery's
10 overall account of what Gardner told him.

11 And then Gardner said that the police claimed they had
12 left a brick of cocaine in the car and Gardner didn't believe it
13 for a minute. Gardner didn't believe it because he was there and
14 he knows what was in the car and they took what was in the car.

15 We also have the evidence of the fact that Montgomery
16 said that Wayne told him he had a .40 caliber with three bodies
17 on it, and Goo, when he was getting out that .40 caliber to work,
18 to use in the Darius Spence robbery, had a .40 caliber with a
19 body on it.

20 We know that the Wyche brothers were killed by a .40
21 caliber gun, ladies and gentlemen. And we've seen the evidence
22 of the Eric Lee murder and how that links together the Wyche
23 brothers murder with the Darius Spence and Tonya Jones Spence
24 robbery/murder.

25 Mr. Dobropolski said something that we haven't heard

1 mentioned by defense counsel. You remember, he talked to Mr.
2 Mitchell alone one day when they were locked up. And Bo, Mr.
3 Mitchell, told Dobropolski that he was going to beat the charges
4 that he was locked up on, meaning the Wyche brothers murder,
5 because his codefendant, Mr. Martin, blabbed to his girlfriend,
6 so he should take the charge. That's what Mr. Dobropolski
7 testified to.

8 Yes, Mr. Martin certainly did not take the charge, but
9 yes, he did blab to his girlfriend. He had to. He had to blab
10 to Lakeisha McCoy because he needed Ms. McCoy to help him with
11 his alibi. And Mr. Mitchell was not at all happy about it.

12 Well, we've seen already that the movie alibi doesn't
13 really work because the movie let out at 11:48. We know that
14 Martin and Gardner were on the phone together at 11:37 for a two
15 minute conversation. Right after, by the way, Mr. Martin got an
16 extended one minute and 22 second voice mail from Mr. Mitchell.
17 Movie ended 11:48 and the murder occurred sometime between 12:31
18 and 12:38 the next morning. It only takes 19 minutes to drive to
19 the location of the murder.

20 So Mr. Martin's only alibi, really, is Lakeisha McCoy,
21 who says that she was with Mr. Martin after the movie ended.

22 You're going to have to decide if you believe Lakeisha
23 McCoy, ladies and gentlemen. And bear in mind the problems that
24 her story has. Besides the improbabilities of having slept
25 through the whole movie, she said that was the first time she

1 ever went out with Mr. Martin. Do you remember that? That's the
2 first date they ever had.

3 First of all, she signed an affidavit in May of 2002 in
4 which she said she waited in the car when Mr. Martin went in to
5 buy the tickets. She then testified in the grand jury and told
6 the police that Mr. Martin paid by a credit card. And then she
7 came to court here today and said she couldn't remember how he
8 paid and had no idea he used a credit card for some purchases.

9 She can't keep her stories straight, ladies and
10 gentlemen, because it's not a true story. It's just an alibi, as
11 Mr. Montgomery said, that was fabricated to provide Mr. Martin
12 with what he needed to get out of his charge.

13 Mr. Pyne talked about the calls between Darryl Wyche
14 and Mr. Mitchell earlier in the evening. Remember Natasha
15 Wyche's testimony. Darryl Wyche and Mr. Mitchell spoke in the
16 afternoon. They had a general plan already in place that day for
17 meeting to do a drug conversation. It was already in place long
18 before 9:34 in the evening when they had their first conversation
19 that we see on the recorded calls list that is W-66.

20 And this event, this murder, was not set up at 11:40
21 p.m., as Mr. Pyne suggests. It was set up over a long period of
22 time, at least from earlier that day, when Bo first arranged to
23 meet with Darryl.

24 Mr. Pyne keeps stressing this, this call where the two
25 telephone records are one minute apart, one phone company's

1 records. And he thinks that Mr. Benson made a mistake and he
2 doesn't understand why the detective thinks it's an accurate
3 account of what happened.

4 Ladies and gentlemen, that's a call between Mr.
5 Mitchell and Darryl Wyche. Mr. Mitchell admits that he was on
6 the phone repeatedly with Darryl Wyche. Has nothing to do with
7 calling Mr. Martin.

8 You can take into consideration, ladies and gentlemen,
9 the conduct of Mr. Martin and Mr. Gardner at the funeral and the
10 clothing that they were wearing. Remember how Natasha Wyche and
11 Dwayne Denham told us about that. You can take into account the
12 fact that Gardner abandoned his phone the next day and got a new
13 phone from, Mr. Martin is actually the one that got him the new
14 phone, subscribed to in Mr. Martin's name.

15 Okay. I'm getting close to the end, I'm sure you're
16 happy to hear. I don't have much to say about the Tonya Jones
17 Spence murder because defense counsel didn't have much to say
18 about it. We don't know when Harold Glaser was hired by Joyce
19 Martin, Joyce Parsons, to be Mr. Martin's attorney. She didn't
20 tell us when. Took her a while to come up with the money. She
21 had to borrow the money and she had no idea when Harold Glaser
22 was hired. For all we know, he was hired long after the Tonya
23 Jones Spence murder. So the fact that Joyce Parsons eventually
24 got money together to pay for Harold Glaser really has nothing to
25 do with the motives of Mr. Gardner in carrying out that murder.

1 Quickly looking over my notes on what Mr. Kurland said
2 to see if there's anything I need to respond to. Ladies and
3 gentlemen, Mr. Kurland made the point that Mr. Montgomery said
4 the surveillances could have lasted as long as two months before
5 the murder happened and, therefore, could have gone back to
6 around April 7th, presumably. Actually, Montgomery was clearly
7 just estimating because he said at one point that it was one to
8 two months and at another point maybe a month and a half, and
9 then eventually he said maybe a couple of months. He doesn't
10 really know.

11 But supposing it was two months? Ladies and gentlemen,
12 we know that Mr. Martin was involved in the Darius Spence murder.
13 Mr. Montgomery told us that he was part of the original, he was
14 an original participant, along with Mr. Gardner and Mr. Holly.
15 They were all going to be involved in that particular heist and
16 it was being considered at the same time that they were
17 considering the Goose robbery. Both of these were robberies
18 planned by the enterprise, by members of the enterprise and
19 members of the conspiracy to be carried out together.

20 So Mr. Kurland's quite right about that. But you
21 remember Mr. Montgomery said that after he got locked up for that
22 parole violation, Mr. Gardner came home and he was all hepped up
23 about getting money and he wanted to activate Montgomery and
24 Holly so that they would really move. They abandoned the Goose
25 project and they started doing surveillances every single day on

1 Darius Spence's apartment. And that's when Gardner took over the
2 operation.

3 He needed money, ladies and gentlemen, because Mr.
4 Martin needed a lawyer. That's what Mr. Montgomery tells us and
5 that's what Mr. Reynolds tells us.

6 It's not the only evidence that that murder is
7 connected to this conspiracy because Martin was part of the
8 original plan, also. This was something that grew out of the
9 same operation, the same planning that went into the Goose thing.

10 We also see the connection in the .40 caliber firearms
11 that were used in the Spence and Wyche murders being also the
12 murder weapons in the Eric Lee murder, where there were two .40
13 calibers that were used.

14 Ladies and gentlemen, I don't know what Mr. Kurland was
15 trying to get out with this business about the walkie-talkie at
16 the end. The one found in the, in the storm drain is identical
17 to the one recovered from Mr. Gardner's car once it was recovered
18 by the police. There was a walkie-talkie in the car at that
19 point. What it means is that Mr. Holly and Mr. Gardner had one
20 walkie-talkie. Mr. Montgomery had a walkie-talkie that he threw
21 out the window, as he says. And there was another walkie-talkie
22 in the car. That's all it means.

23 Mr. Martin talked about the retaliation count. Ladies
24 and gentlemen, you recall Mr. Hayes's testimony. He was locked
25 up on a state charge and there was a federal warrant on him. He

1 went to jail that weekend because he was arrested on a Friday
2 afternoon around 3:00 in the afternoon. He did go to state court
3 and he was ROR'd. That means released on his own recognizance.
4 He just had a few crack pills or something on his person. And in
5 state court that doesn't, that's not an offense they're going to
6 detain anybody on. He was actually released on the state charge
7 and brought over to federal court on the warrant by an ATF agent.
8 And Agent Klas helped him.

9 There was never any intent to talk to him without a
10 lawyer. He was brought over for an initial appearance on the
11 warrant. Detective Benson made a mistake when he testified as a
12 summary witness. He speculated that he was being brought over
13 possibly to be talked to. But he was just wrong. He was brought
14 over on the fugitive warrant.

15 Look at the videotape if you want to. You probably
16 remembered it. We played it several times. When Harris gets up
17 and storms over to Mr. Hayes in the lockup and shouts words about
18 Mr. Hayes being a rat, as we heard both from Mr. Hayes and when
19 Mr. Gregory Mungo was here. Hayes raises his arm up. He doesn't
20 slug Mr. Harris. He raises his arm defensively and Mr. Harris
21 assaults him.

22 A few words about credibility and incentive to make up
23 a story, ladies and gentlemen. It's one of the questions that we
24 all ask when we're deciding whether we believe someone. There
25 are a number of good questions to ask when we're deciding whether

1 we believe someone and we all do it sort of subconsciously.

2 One of the questions we ask is, does this person have
3 an axe to grind, meaning does this person have some motive or
4 incentive to mislead people.

5 There are other good questions to ask, that I would
6 encourage you to ask. Has this person's account of what happened
7 been consistent over time? We have had in this case witness
8 after witness after witness about whom you heard there were
9 volumes of prior testimony and prior proceedings in the grand
10 jury, and proffer sessions and all this paperwork.

11 If there were inconsistencies between what they told us
12 in this courtroom and what they told those prior proceedings over
13 the course of years, we can be very confident that these defense
14 attorneys would have brought it to your attention. But there was
15 actually relatively little of that. And the reason is, ladies
16 and gentlemen, that the government's witnesses in this case were
17 consistent over time.

18 Ask yourselves if the witnesses are corroborated by the
19 other evidence. We've heard a great many explanations and
20 details about that already and I'm not going to repeat them now.

21 Ask yourselves about the demeanor of the witness. Ask
22 yourselves if the witness appeared to be candid and forthright,
23 or did the witness appear to be evasive.

24 Remember Natasha Wyche. Remember how she admitted that
25 she didn't pick Bo's picture out of the photo array because she

1 wanted him to be killed on the street. Remember that? Witness
2 after witness after witness came in here and had to admit to
3 criminal activity in order to testify. And I suggest to you,
4 ladies and gentlemen, that only a minority of the civilian
5 witnesses you heard from had any kind of deal ever with the
6 government.

7 The following witnesses, civilian witnesses, were
8 never, never had any charge, never had any cooperation deal:
9 Natasha Wyche, Damita Green, Dwayne Denham, Kelly David, Andrea
10 Smith, Nieshia Duganne, Marquetta Duganne, Jaquetta Smith, the
11 three, Arlene Williams and Shannon Harris, Mr. Harris's
12 relatives, Shamier Delvison, his former girlfriend, Andre Drake,
13 Sherry Fickling.

14 Even Chris Dobropolski, when he came to court to
15 testify, had no kind of active deal with the government. He had
16 gotten a few months, not four years, off his sentence, as Mr.
17 Martin told you, but a few months off his sentence back in 2003,
18 when the detectives got him paroled early so that he could work
19 operationally for them. He was then arrested again later on for
20 another crime. Nothing was done to help him. And he was still
21 in jail for that offense when he came here and testified. And he
22 was getting nothing for testifying. That's what he testified to.

23 Here are the cooperators that you heard from, the ones
24 who had plea agreements: Eric Clash and Travis Golder, the two
25 guys from the Rice organization. They didn't have evidence that

1 actually relates to any of the charged conduct in this case
2 except that it related to the motive for the McCaffity/Brown
3 murder.

4 The other four people who had been, who had deals with
5 the government included Mr. Hayes and Mr. Bacon. But there are
6 two very important things about those two witnesses. Both of
7 them had come to the grand jury and testified before they had any
8 federal charge against them. They were both subpoenaed. They
9 both appeared here and testified in the grand jury in 2004 before
10 they ever even had their federal charge. It was only later that
11 they picked up a charge that was taken federally. And they both
12 pled to five years sentences in state court, no parole sentences.
13 And they both had gotten out fairly recently.

14 And so they'd done their time pursuant to their plea
15 agreements. They were permitted, pursuant to their plea
16 agreements, to plead in state court and get five year sentences.
17 That's what you heard in their plea agreements.

18 They did their time. They got out. And when they came
19 to court here, they'd already served their sentences.

20 So not only had they testified already before they even
21 had a charge, they no longer had -- their plea agreements were in
22 a sense defunct because they'd already done the time on the
23 sentences provided for in the plea agreements.

24 The only two witnesses who had plea agreements and have
25 not yet been sentenced were Mr. Montgomery and Mr. Reynolds. And

1 I want to tell you something about these plea agreements, ladies
2 and gentlemen.

3 All of the plea agreements, and we went through the
4 language in some of them, and you can read them, all of them are
5 structured to create a maximum incentive on the person pleading
6 guilty to tell the absolute truth. That's what the plea
7 agreement is designed to do.

8 If there's any occasion when a cooperator lies or comes
9 into court and misleads people, that's the end of his benefits
10 under that plea agreement. He can not only lose all the benefits
11 and face the maximum penalties for the charges he's pled guilty
12 to, he can have new charges brought against him. All sorts of
13 terrible things are outlined in the plea agreements.

14 And if there's a dispute, it's the court that
15 decides -- look at the language in the plea agreements -- it's
16 the court that decides if, in fact, a witness has failed to tell
17 the truth or has been consistent with his plea agreement.

18 Mr. Martin said some things about Mr. Dobropolski. Mr.
19 Dobropolski knew details about the McCaffity/Brown murder that he
20 could not possibly have made up. That's an important question to
21 ask whenever you're considering the credibility of a witness,
22 also. Is his or her account inherently probable or improbably?
23 Well, Mr. Dobropolski could not possibly have made up the details
24 he knew about the McCaffity/Brown murder. He could not possibly
25 have made up what we know was the case from all of the evidence.

1 That Mr. Harris got into the back seat of the car and shot the
2 two of them in the head. He could not have made that up. He
3 could not have known it any way than from Harris.

4 He could not have known that when Harris got out of the
5 car, the car rolled down the hill. How could -- one person in
6 Baltimore knew that besides Mr. Harris and that was Jason Elder,
7 the guy who did the GPS monitoring and mapped it out for us.
8 Nobody else in Baltimore knew that's how that matter came down
9 other than Mr. Harris. Dobropolski could have only known it from
10 Mr. Harris.

11 Mr. Lawlor kept saying yesterday that Rodney Hayes lied
12 in the grand jury and Mr. Hayes admitted that he gave the wrong
13 caliber for the gun that he pulled on Mr. Harris when they had
14 that confrontation on Woodland Avenue in 2002. And Mr. Harris
15 pulled a knife on Hayes and Hayes pulled a gun out. Hayes said
16 in the grand jury that it was a 9 millimeter and he told us it
17 was really the .40 caliber.

18 But what the big lie was about was not a lie at all.
19 One of the defense attorneys confronted Mr. Hayes with a
20 statement he allegedly made in the grand jury about, about
21 allegedly not knowing what Mr. Harris was going to use the gun
22 for. And Mr. Hayes thought about it and admitted that if he said
23 he didn't know what Harris was going to use the gun for, then
24 that was a lie because he knew very well what Mr. Harris was
25 going to use the gun for. He needed the gun to kill Claudus

1 Lassiter, as Mr. Mitchell had instructed him.

2 But it turned out, ladies and gentlemen, that Mr. Hayes
3 had never been asked that question in the grand jury. He'd been
4 asked if Mr. Harris told him what he was going to use the gun for
5 and Mr. Hayes answered no, Mr. Harris didn't tell me what he was
6 going to use the gun for. So the big lie didn't exist. Mr.
7 Hayes didn't lie about that.

8 Mr. Hayes's grand jury transcripts are in evidence,
9 ladies and gentlemen. You can read them. They are a little bit
10 redacted but they're in evidence and you can read them. And you
11 will see that in the very first one, when he came in without any
12 kind of plea agreement, pursuant to a subpoena, without any
13 federal charge hanging over his head or anything, he incriminated
14 Mr. Harris and Mr. Bo in the murder just as thoroughly as he did
15 when he came into this courtroom and testified for you.

16 Mr. Kurland said something about Bacon admitting that
17 he committed perjury. I don't recall Bacon ever admitting that
18 he committed perjury.

19 Okay. Ladies and gentlemen. I have every confidence
20 in your judgments. I think that many of the decisions you will
21 have to make in this case when you begin to deliberate are going
22 to be easy and some of them are going to be less easy. Up to you
23 to decide how you want to proceed in your decisionmaking process.

24 You could consider the idea of doing the easy ones
25 first and proceeding to the harder ones. But it's entirely up to

1 you. And the judge isn't going to tell you how to make your
2 decisions, either, because it's for you to decide.

3 All I can say is, once again, on behalf of the United
4 States, thank you very much for your service. Thank you very
5 much for your attention and your care and your concern that
6 justice is done in this case because that's what the United
7 States want to have happen in this case.

8 Thank you very much.

9 THE COURT: Thank you, Mr. Harding.

10 I won't detain you for a second longer, ladies and
11 gentlemen, than I need to, simply to reiterate my instructions.
12 Continue to keep an open mind. Do not discuss the case. Conduct
13 no investigation. Avoid any media reports of the case.

14 I'd like you to be here tomorrow morning by 9:30. I
15 will instruct you on the law applicable to this case. I will
16 tell you that it is likely to take me two hours plus, I think, to
17 read all of the instructions. I'll have a separate copy for each
18 of you. And then we will break for lunch. Ordinarily, frankly,
19 I would buy you lunch tomorrow but my feeling is you're probably
20 going to want to get some fresh air and perhaps take a walk. But
21 we can deal with that tomorrow.

22 In fact, I will buy you lunch tomorrow. Not me
23 personally. I don't want, I'd be happy to do that, but that
24 wouldn't be appropriate. But the Court will provide you with
25 menus tomorrow morning so that you can make your selections.

1 We'll have lunch delivered. And what I'm hoping and expecting is
2 that lunch will probably be delivered just at the time when I've
3 concluded my instructions to you, pretty close to twelve o'clock,
4 a little earlier than usual, perhaps. But I'll let you tell us
5 what time you want lunch delivered.

6 But I'm sure that you'll want to take a break. So at
7 some point in mid-afternoon, you'll be permitted to leave the
8 jury room for 10 or 15 minutes. But I'm sure you're anxious to
9 get to work reviewing the evidence and we want to make that
10 possible.

11 So that's how we'll proceed. Again, our alternates
12 continue to be important to us. Everything I say applies equally
13 to you. And you'll have your own separate copy of the
14 instructions as well.

15 Enjoy your evening, ladies and gentlemen. We'll see
16 you at 9:30 tomorrow for jury instructions. Jury is excused
17 until 9:30 tomorrow.

18 (Jury exits the courtroom at 5:25 p.m.)

19 THE COURT: The defendants are excused. I want to
20 spend just a few minutes with counsel.

21 I'm sorry. Mr. Lawlor, did you have a motion?

22 MR. LAWLOR: It's nothing regarding the case, Your
23 Honor. Well, it is.

24 THE COURT: Let's excuse, let's excuse the defendants,
25 please.

1 (Defendants exit the courtroom.)

2 THE COURT: Yes, Mr. Lawlor.

3 MR. LAWLOR: Thank you, Judge. Your Honor, I thought
4 we were going to be done, based on the conversations we had all
5 week, by this evening with instructions. I scheduled a
6 conference.

7 THE COURT: That makes two of us.

8 MR. LAWLOR: Probably ten of us, actually. And I --

9 THE COURT: The answer is yes, of course.

10 MR. LAWLOR: I scheduled a conference call, so can I be
11 late?

12 THE COURT: Of course. Of course. I will comment to
13 the jury.

14 MR. LAWLOR: Appreciate it.

15 MR. MARTIN: Can I stay home and sleep tomorrow
16 morning?

17 THE COURT: No. We're going to need you here, Mr.
18 Martin. Yes, Ms. Rhodes.

19 MS. RHODES: Can I ask what your procedure is for both
20 of us being here when the jury is out or one of us being here, or
21 how you want it? Since we're from kind of 45 minutes away?

22 THE COURT: Yeah. The two lawyer rule is absolutely
23 off the table at this point. So actually, Mr. Martin can stay
24 home and sleep tomorrow.

25 MR. MARTIN: Your Honor, I'll be here.

1 THE COURT: After I instruct. After I instruct.

2 MS. RHODES: Right. So you want one of us here all the
3 time?

4 MR. MARTIN: Actually, Your Honor, I'll probably sleep
5 while you instruct.

6 THE COURT: Just --

7 MR. MARTIN: If you weren't instructing, you'd probably
8 sleep, too.

9 THE COURT: A couple of quick things, counsel.
10 Obviously, we need to anticipate, I think it's obvious that we
11 need to anticipate that the jury is likely to want to hear and/or
12 view the audio and video evidence. I am absolutely happy, if you
13 all are, to send in to the jury a laptop that will permit them to
14 review that digital evidence as they wish.

15 MR. MARTIN: Absolutely, Your Honor.

16 THE COURT: I know you join me in wanting as much as
17 possible to avoid us having to reconvene here in court every time
18 one juror or more wants to look at a tape or listen to a tape.

19 So I know you got a lot to do, Mr. Harding, and you can
20 see I'm looking at the government. Mr. Hanlon, I think, has a
21 specialty in this area. But to the extent, to the extent that
22 you can, you know, by midday tomorrow put all the digital
23 evidence on a CD and give us a clean laptop, and maybe the court
24 has a laptop, that we can send all that in, it would, believe me,
25 we would all be very, very pleased about that.

1 Any comments, Mr. Harding?

2 MR. HARDING: I don't know whether I can get a clean
3 laptop from my office or not.

4 THE COURT: We can get a clean laptop. We can get a
5 clean laptop. I'm confident the court can get a clean laptop.

6 MR. MARTIN: I can get one, Your Honor.

7 THE COURT: Yeah, we can get a clean laptop. How did
8 you make out, Ms. Rhodes, in getting that tape?

9 MS. RHODES: Ms. Arrington has it. It's done.

10 THE COURT: It's done?

11 MS. RHODES: I do have a little cassette recorder I can
12 send in.

13 THE COURT: I guess it's too late for us to actually
14 digitize that tape. That can't be done? In other words, we
15 can't put it on a CD?

16 MS. RHODES: Well, maybe Tech Services can. I'm not
17 sure.

18 THE COURT: Okay. We'll take a look.

19 MS. RHODES: Also, this thing is very easy to operate.
20 And there's other cassettes that are going in. Aren't there? At
21 least one other, or two others.

22 THE COURT: Yeah, if we're going to have cassettes,
23 that's great. We also have cassette players. But if you can
24 leave yours.

25 MS. RHODES: Sure.

1 THE COURT: That's great. So we're sending in
2 everything except the weapons and the ammo and the narcotics. Is
3 there anything that we're not sending in other than that, Mr.
4 Kurland?

5 MR. KURLAND: Your Honor, I looked, there's that
6 Gardner documentary exhibit that has the reference to the state
7 case that I looked for. Wasn't in the defense. It wasn't in the
8 defense exhibit file. And Mr. Coburn told me that his last
9 recollection was that government used it as part of the recross,
10 that it might be stuck in one those files. It's a small but
11 fairly significant thing and I just don't know what to do about
12 that.

13 THE COURT: I don't know what to do about it.

14 MR. KURLAND: I don't know. Is it, I mean, I didn't
15 want to look helter skelter through the government exhibits
16 there.

17 MR. HARDING: I'll look for it, Your Honor. It was,
18 W-3 was a defense exhibit. And it may also have been a
19 government exhibit. I don't, I don't think it was because it
20 actually wasn't even introduced until Mr. Coburn was doing his
21 cross.

22 THE COURT: Right. I remember that. All right. Are
23 the exhibits otherwise all set to go?

24 MR. KURLAND: I don't mind, Your Honor, looking through
25 all the things tomorrow morning. I'll try.

1 THE COURT: Okay. That would be great, Mr. Kurland.
2 But are the exhibits otherwise ready to go?

3 MR. MARTIN: Think so, Your Honor.

4 THE COURT: Mr. Hanlon?

5 MR. HARDING: Mr. Hanlon will speak to that.

6 MR. HANLON: Your Honor, as far as the government
7 knows, everything on that cart is in evidence. We've checked it.
8 And everything that's in evidence is on that cart with the
9 exception of the weapons and the ammunition.

10 THE COURT: Perfect.

11 MR. HANLON: I think it would be a good idea for
12 defense counsel to look at the cart and make sure they are
13 comfortable with everything.

14 THE COURT: I agree. I absolutely agree.

15 MR. HANLON: And there's another thing that I hesitate
16 to bring up.

17 THE COURT: I really appreciate that, Mr. Hanlon. And
18 I would like to emphasize that, really, counsel, if you can get
19 here as early as you can tomorrow morning, and in a very orderly
20 fashion really, under Ms. Arrington's supervision, just go
21 through and eyeball really everything that's on the cart,
22 because, you know, let's not have a glitch now with something
23 going in that shouldn't go in. So please, just eyeball
24 everything.

25 MR. LAWLOR: Isn't that required, Your Honor? Don't we

1 have to sign?

2 MR. MARTIN: Not --

3 THE COURT: I'm sorry.

4 MR. LAWLOR: I thought the attorneys had to sign a
5 certification that we've reviewed the exhibits before they go
6 back.

7 THE COURT: No. No.

8 MR. HANLON: When we get the exhibits back.

9 THE COURT: When you get them back.

10 MR. LAWLOR: I thought, at least in Greenbelt --

11 THE COURT: Really? We've never done that in
12 Baltimore. It's probably because something went in down there.

13 MR. MARTIN: That's it, Your Honor. I remember when it
14 did.

15 THE COURT: I have a vague recollection of that. It
16 was a major mistrial, as I recall. Or at least --

17 MS. RHODES: In Virginia too. In the Eastern District
18 of Virginia, a case.

19 THE COURT: Mr. Hanlon.

20 MR. HANLON: Your Honor, there is one other thing.
21 Going through the exhibits, I think, is an important part. We'll
22 do that. Many of the exhibits from the Spence case, I hesitate
23 to bring this up, but many of the Spence exhibits have state
24 exhibit numbers on them, on envelopes and things like that. I
25 have to tell you that at this stage of the case, as long as we've

1 gone through them, I'm not sure how concerned I am about that any
2 more.

3 THE COURT: I agree.

4 MR. KURLAND: Your Honor, I'll address that.

5 THE COURT: It doesn't have the name of the case, does
6 it?

7 MR. HANLON: No, it doesn't have the name of the case.
8 We could probably go through and put some kind of sticker on top
9 of them.

10 THE COURT: I wouldn't bother. Mr. Kurland, you want
11 to be heard on that?

12 MR. KURLAND: Yes, sir.

13 THE COURT: They know that there have been all kind of
14 state proceedings. And in fact, I mean, we have letters from
15 state's attorneys. You mentioned in your closing Mr. Stocksdales,
16 the State's Attorney who was present at those proffer sessions.

17 MR. KURLAND: But Your Honor --

18 THE COURT: I don't see a problem.

19 MR. KURLAND: Well, I just want to put on the record
20 that Your Honor made, after repeated requests by the defense to
21 get in the fact that Mr. Gardner's been convicted of the Spence
22 offense, which would have helped out in closing argument given
23 the manner in which the government argued, that we would object
24 to those state tags being on those exhibits because everybody,
25 everybody scrupulously stayed off the line. And even though

1 there's reference to state proceedings, I made sure that in the
2 transcript of Jamane Johnson, that all references with respect to
3 the caption of the case were deleted.

4 And I would object if those Spence documents go in with
5 the State exhibit tab. That's going to indicate to the jury that
6 there was, in fact, a Spence murder trial and that the likelihood
7 that Mr. Gardner was acquitted, I think, was acquitted and that's
8 why we're here, particularly in light of the government's
9 argument, I want to just strenuously object and put it on the
10 record.

11 Obviously, I'm not going to help the government or
12 anyone else put little tabs on it. They probably wouldn't let
13 me. But I want to put on the record that if those go in with
14 state exhibit tabs, we object to that.

15 MR. HANLON: Here's what we'll do, Your Honor. I'll
16 put stickers on top of the State --

17 THE COURT: Wait a second, though. Am I correct that
18 Mr. Gardner's conviction is still on appeal?

19 MR. KURLAND: No. No. Not at all.

20 THE COURT: It's been affirmed?

21 MR. KURLAND: No. Mr. Gardner's, Mr. Gardner's direct
22 appeal was denied by the intermediate Court of Appeals. The
23 state Supreme Court is the --

24 THE COURT: No. I just wanted to clarify that. I
25 thought there was some -- I know you were telling me about the

1 post-conviction.

2 MR. KURLAND: Post-conviction.

3 THE COURT: So it's no longer on direct appeal. That
4 was my concern. So it's not likely -- I mean, are you satisfied?
5 Because it's, in a sense you're defacing a state exhibit that
6 might be needed in state proceedings. And I wouldn't order you
7 to do that over what seems to be a tenuous objection.

8 MR. HANLON: That was part of my concern, Your Honor.
9 It might be more theoretical than anything. But I feel like if
10 we put stickers on top of stickers as opposed to ripping stickers
11 off --

12 THE COURT: Right. Right. Right. So all they say are
13 State's Exhibit X, State's Exhibit Y.

14 MR. HARDING: That's correct.

15 THE COURT: Doesn't say Maryland?

16 MR. HANLON: No, nothing.

17 THE COURT: If you don't mind doing it, Mr. Hanlon,
18 that's fine. We're talking about photographs and --

19 MR. KURLAND: Guns, walkie-talkies. No. There's tons
20 of stuff.

21 THE COURT: Well, we're talking about the bags
22 containing the weapons and firearms.

23 MR. HANLON: Yes, sir.

24 THE COURT: All right.

25 MR. HANLON: We can do it. It's not as monumental as

1 it may seem.

2 THE COURT: All right, Mr. Hanlon. Are you going to
3 get here at 8:00 to do that?

4 MR. HANLON: I'm happy to if Belinda's going to be
5 available.

6 THE COURT: I don't want to delay. When I send that
7 jury out, I want those exhibits going in right behind them. I
8 want that cart to hit the last juror in the butt, so to speak.

9 MR. KURLAND: Your Honor, just a procedural question.
10 Just, after you instruct, after the Court instructs, Mr. Coburn's
11 obviously gone. I haven't seen my family in a week. And I need
12 to get back home. And I just want to make sure that I am in
13 compliance with however close I'm supposed to be. Can I go back
14 to Montgomery County after the jury, after you instruct?

15 THE COURT: No, Mr. Kurland. I'm afraid not. My
16 practice is to call the jury in at 5:30 every day and ask them,
17 Do you want to keep working or do you want to call it a day?
18 Now, my strong suspicion, I mean, I don't know if you all have
19 noticed, but I think, my suspicion is Juror Number Ten has a
20 serious, either child care or something's going on for her in the
21 evening and she wants to get out of here.

22 So I don't have any concern, frankly, that this jury is
23 likely to want to stay late. They certainly aren't going to want
24 to stay late tomorrow and I'm not going to let them stay late
25 tomorrow.

1 Frankly, my suspicion is they're going to want to get
2 out of here by four tomorrow. But I have to have you here -- I'm
3 sorry Mr. Coburn's not here -- when I excuse the jury.

4 Now, going forward on Monday, you don't have to be here
5 because what I do on the second day of deliberations, as I will
6 tell them tomorrow, they just, in fact, I already told them, they
7 show up at whatever time they agree and they go right in the jury
8 room. And once all 12 of them are here, Belinda will take the
9 exhibits in. So we don't come back into the courtroom,
10 obviously.

11 And they work and we bring them lunch. And we just
12 wait to hear from them. We get a note, we get everybody on the
13 phone. Basically, I mean, I don't expect you to be here on
14 Monday, I would even say at all on Monday. I mean, it's sort of
15 risky, particularly if Mr. Coburn's not here. But if you want to
16 stay down in Montgomery county on the assumption that we're not
17 likely to need to come into court on Monday, that's fine.

18 MR. KURLAND: Okay. I'll talk to the Court more about
19 that at the end of the day tomorrow. But I'll definitely stay
20 here for the full day tomorrow.

21 THE COURT: We're going to get out of here by four
22 tomorrow.

23 MR. KURLAND: Your Honor, next week, I expect Mr.
24 Coburn to be back Monday. But Wednesday, I'm going to Los
25 Angeles.

1 THE COURT: We're going to have a verdict on Tuesday.

2 MR. KURLAND: Thanks, Judge.

3 MS. RHODES: What's it going to be?

4 THE COURT: I have no idea. Thank you all very much.

5 9:30.

6 MR. CROWE: Your Honor --

7 THE COURT: Oh. Sorry, Mr. Crowe.

8 MR. CROWE: This is a very small point in a very big
9 trial but I just want to make sure. I just want to bring
10 something to the Court's attention. One of the curative
11 instructions I gave was, and it's at the bottom of Page 22 of the
12 most recent iteration, was that Dobropolski said that Harris told
13 him that an unnamed individual who was facing state charges
14 against Mr. Mitchell, about that. And what he said was that an
15 unnamed defendant, the unnamed individual is going to take the
16 charges.

17 Mr. Harding said in his closing today that it was
18 actually a statement which Dobropolski had made to Mitchell.

19 Now, I don't have the, I understand other people have
20 the Dobropolski transcript. I don't. But if that's wrong, I
21 would like to find some way to at least get the thing corrected
22 before it is read to the jury.

23 THE COURT: I'm sorry. Mr. Harding says?

24 MR. CROWE: Mr. Harding said that Mr. Mitchell told
25 Dobropolski somebody who was charged with him was going to take,

1 was going to take the charge and Mitchell was going to go
2 scot-free.

3 MR. HARDING: I've got the transcript. I'll bring it
4 tomorrow morning. I think Mr. Crowe is right. It was Mr.
5 Mitchell, not Mr. Harris.

6 MR. CROWE: That's not the way I put it in the
7 instruction, which the Court incorporated at the bottom of Page
8 22.

9 The other thing I remember is that the judge said, is
10 that the Court said it that could only be used against the person
11 making the statement, although I think Mr. Harding brought it up
12 today.

13 THE COURT: So it should read, Dobropolski testified
14 about a statement --

15 MR. CROWE: Mr. Mitchell.

16 THE COURT: -- Mr. Mitchell made to him about an unnamed
17 individual who was facing state charges with Mr. Mitchell.

18 MR. HARDING: Judge, I object to having that statement
19 admitted only against Mr. Mitchell or Mr. Harris. It was a
20 coconspirator's statement. Your Honor has admitted all of
21 Dobropolski's statements that he heard from Mitchell and Harris's
22 coconspirator statements.

23 THE COURT: No. But I think Mr. Crowe is right, or at
24 least --

25 MR. CROWE: I believe the Court said that that could

1 only be made, be used against the individual who uttered it. The
2 question is, who is the individual?

3 THE COURT: I didn't find that to be a statement in
4 furtherance of the conspiracy, did I?

5 MR. CROWE: That was my understanding, Your Honor.

6 THE COURT: And that's why, that's why you asked me to
7 put in the special instruction.

8 MR. CROWE: And messed up the people, yeah.

9 MR. HARDING: Well, the transcript will, will reveal
10 that, too, I assume, Your Honor.

11 MR. CROWE: Sure.

12 THE COURT: Well, I think Mr. Crowe is accepting your
13 representation, Mr. Harding.

14 MR. HARDING: He is as to who was speaking but not as
15 to whether it was -- I don't recall the Court ever saying it was
16 not a coconspirator's statement, it would only be admitted
17 against the speaker. I don't recall that. Maybe, maybe it
18 happened. I just don't recall it. But we'll know when we get
19 the transcript.

20 MR. CROWE: Other defense counsel have told me they do
21 recall that the Court restricted the statement. And in fact,
22 they said that I got it wrong in here and it was, in fact,
23 Mitchell. But I was just concerned, I didn't want the Court to
24 take the bench and have the written instructions and then --

25 THE COURT: I appreciate that.

1 MR. CROWE: -- find that tomorrow morning.

2 THE COURT: I appreciate that. No. It's not, even as
3 I sit here and think about it now, it doesn't strike me as a
4 statement made by a coconspirator in furtherance of the
5 conspiracy. Somebody else is going to take a charge for me.
6 That doesn't further the conspiracy except in a very tenuous way.
7 I'm sure that was my ruling.

8 MR. HARDING: Well --

9 THE COURT: So the question is, it was Mr. Mitchell who
10 made the statement, not Mr. Harris?

11 MR. CROWE: Yes, sir. So it should only be used
12 against --

13 THE COURT: It's admissible against Mr. Mitchell --

14 MR. CROWE: That's correct.

15 THE COURT: -- not against Harris, et al. All right.
16 Mr. Crowe, thanks. You realize I got to change -- I've already
17 photocopied.

18 MR. LAWLOR: Slide that one page in there.

19 THE COURT: We can fix it.

20 MR. CROWE: I apologize.

21 THE COURT: No. That's all right, Mr. Crowe. Thank you
22 all very much.

23 (Conclusion of Proceedings at 5:45 p.m.)
24
25

REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of USA v. Willie Mitchell, et al., Case Number(s) AMD-04-029, on November 20, 2008.

I further certify that the foregoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In Witness Whereof, I have hereunto affixed my signature this _____ day of _____, 2009.

Mary M. Zajac,
Official Court Reporter

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